



Arbitration CAS 98/200 AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA), award of 20 August 1999

Panel: Mr. Massimo Coccia (Italy), President; Dr. Christoph Vedder (Germany); Dr. Dirk-Reiner Martens (Germany)

Football

Conflicts of interest related to multi-club ownership within the same competition

Application of EC law to sport

Status of UEFA according to EC law

Right to be heard

Principle of procedural fairness

1. If clubs with the same owner can take part in the same competitions, whether national or international, doubts may arise as to whether the outcome is really undecided in advance. The challenged UEFA Rule is therefore an essential feature for the organization of a professional football competition and is not more extensive than necessary to serve the fundamental goal of preventing conflicts of interest which would be publicly perceived as affecting the authenticity, and then the uncertainty, of results in UEFA competitions.
2. Membership of UEFA is open only to national football associations situated on the continent of Europe who are responsible for the organization and implementation of football-related matters in their particular territory. The UEFA Statutes attribute voting rights only to national federations, and article 75 of the Swiss Civil Code (CC) refers to members which have voting rights within the association whose resolution is challenged. Clubs do not meet these requirements.
3. Under Article 75 CC, members of an association have the right to be heard when resolutions are passed which affect them to a significant extent. However, requiring an international sports federation to provide for hearing to any party potentially affected by its rule-making authority could quite conceivably subject the international federation to a quagmire of administrative red tape which would effectively preclude it from acting at all to promote the game.
4. The doctrine of *venire contra factum proprium* provides that where the conduct of one party has led to the legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party. *In casu*, UEFA may not change its Cup Regulations without allowing the clubs sufficient time to adapt their operations to the new rules accordingly. However, such procedural defect by itself does not warrant the permanent annulment of the contested UEFA Rule.

- 5. Sport is subject to Community law only insofar as it constitutes an economic activity within the meaning of Article 2 of the EC Treaty. EC law does not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only.**

The Claimant AEK PAE (hereinafter «AEK») is a Greek football club incorporated under the laws of the Hellenic Republic and having its seat in Athens. AEK currently plays in the Greek first division championship and over the years has often qualified for the European competitions organized by UEFA. At the end of the 1997/98 football season AEK ranked third in the Greek championship, thus becoming eligible to participate in the 1998/99 UEFA club competition called «UEFA Cup». AEK is owned as to 78.4% by ENIC Hellas S.A., a company wholly controlled, through subsidiaries, by the English company ENIC plc.

The Claimant SK Slavia Praha (hereinafter «Slavia») is a Czech football club incorporated under the laws of the Czech Republic and having its seat in Prague. Slavia currently plays in the Czech-Moravian first division championship and along the years has often qualified for the UEFA competitions. At the end of the 1997/98 football season, Slavia ranked second in the Czech-Moravian championship, thus becoming eligible to participate in the 1998/99 UEFA Cup. Slavia is owned as to 53.7% by ENIC Football Management Sarl, a company wholly controlled, through subsidiaries, by ENIC plc.

Both AEK and Slavia are under the control of ENIC plc (hereinafter «ENIC»), a company incorporated under the laws of England and listed on the London Stock Exchange. In the last couple of years ENIC, through subsidiaries, has invested in several European football clubs, acquiring controlling interests in AEK, Slavia, the Italian club Vicenza Calcio SpA, the Swiss club FC Basel, and a minority interest in the Scottish club Glasgow Rangers FC.

The Respondent Union of European Football Associations (hereinafter «UEFA»), association which has its seat in Nyon, Switzerland, is a sports federation which has as its members all the fifty-one national football associations (*i.e.* federations) of Europe. UEFA is the governing body for European football, dealing with all questions relating to European football and exercising regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players. Pursuant to the UEFA Statutes, member associations must comply with such Statutes and with other regulations and decisions, and must apply them to their own member clubs. Until the 1998/99 European football season UEFA has organized three main club competitions: the Champions' League, the Cup Winners' Cup and the UEFA Cup. UEFA has recently resolved to cancel the Cup Winners' Cup and, as of the 1999/2000 season, has reduced the main club competitions to the Champions' League and the UEFA Cup.

During 1997 ENIC acquired the above-mentioned controlling interests in AEK, Slavia and Vicenza. In the 1997/98 European football season, these three clubs took part in the UEFA Cup Winners'

Cup and all qualified for the quarter final. At this stage, the three ENIC-owned clubs were not drawn to play against each other and only one of them reached the semi-finals (AEK lost to the Russian club Lokomotiv Moscow, Slavia lost to the German club VfB Stuttgart, whereas Vicenza defeated the Dutch club Roda JC). Being confronted with a situation where three out of eight clubs left in the same competition belonged to a single owner, UEFA started to consider the problems at stake.

On 24 February 1998, at ENIC's request, representatives of UEFA and ENIC met in order to discuss the issue of «multi-club ownership», that is the ethical and non-ethical questions raised by the circumstance that two or more clubs controlled by the same owner take part in the same competition. In that meeting ENIC proposed to UEFA a «code of ethics» to be adopted by football clubs, with a view to convincing UEFA not to adopt a rule banning teams with common ownership from participating in the same UEFA competition.

After the meeting, ENIC exchanged correspondence with UEFA and submitted a draft code of ethics for consideration. Thereafter, UEFA referred the issue of multiple ownership to some of its internal bodies, namely the Committee for Non-Amateur Football, the Juridical Committee and the Committee for Club Competitions. These came to the conclusion that there was no guarantee that a code of ethics would be effectively implemented and that a code of ethics was not a viable solution. They therefore recommended to the Executive Committee of UEFA that the rule at issue in this arbitration be adopted.

On 7 May 1998, UEFA sent to its member associations several documents to be communicated to the clubs entitled to compete in the 1998/99 UEFA Cup. In particular, UEFA sent the regulations and the entry forms for the 1998/99 UEFA Cup and the booklet entitled «Safety and security in the stadium – For all matches in the UEFA competitions». The UEFA Cup regulations set forth the conditions of participation without any mention of a limitation related to multi-club ownership. Moreover, the regulations did not make reservation for future amendments, except in the event of «force majeure». At that time, pursuant to the regulations, both AEK and Slavia were entitled to compete in the 1998/99 UEFA Cup because of their results in the 1997/98 national championships.

On 19 May 1998, the UEFA Executive Committee finally addressed the issue of multi-club ownership and adopted the rule at issue in these proceedings (hereinafter the «Contested Rule»). The Contested Rule is entitled «*Integrity of the UEFA Club Competitions: Independence of the Clubs*» and reads as follows:

«A. General Principle

It is of fundamental importance that the sporting integrity of the UEFA club competitions be protected. To achieve this aim, UEFA reserves the right to intervene and to take appropriate action in any situation in which it transpires that the same individual or legal entity is in a position to influence the management, administration and/or sporting performance of more than one team participating in the same UEFA club competition.

B. Criteria

With regard to admission to the UEFA club competitions, the following criteria are applicable in addition to the respective competition regulations:

1. *No club participating in a UEFA club competition may, either directly or indirectly:*
 - (a) *hold or deal in the securities or shares of any other club, or*
 - (b) *be a member of any other club, or*
 - (c) *be involved in any capacity whatsoever in the management, administration and/or sporting performance of any other club, or*
 - (d) *have any power whatsoever in the management, administration and/or sporting performance of any other club participating in the same UEFA club competition.*
2. *No person may at the same time, either directly or indirectly, be involved in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in the same UEFA club competition.*
3. *In the case of two or more clubs which are under common control, only one may participate in the same UEFA club competition. In this connection, an individual or legal entity has control of a club where he/she/it:*
 - (a) *holds a majority of the shareholders' voting rights, or*
 - (b) *has the right to appoint or remove a majority of the members of the administrative, management or supervisory body, or*
 - (c) *is a shareholder and alone controls a majority of the shareholders' voting rights pursuant to an agreement entered into with other shareholders of the club in question.*
4. *The Committee for the UEFA Club Competitions will take a final decision with regard to the admission of clubs to these competitions. It furthermore reserves the right to act vis-à-vis clubs which cease to meet the above criteria in the course of an ongoing competition».*

On 20 May 1998, UEFA released a press statement announcing the adoption of the Contested Rule. On 26 May 1998, UEFA communicated the Contested Rule to all its member associations through Circular Letter no. 37, a copy of which was sent to ENIC, informing that the new provision would be effective as of the start of the new season.

Subsequently, pursuant to Paragraph B.4 of the Contested Rule, the UEFA Committee for Club Competitions decided that the following criteria would determine which of two or more commonly owned clubs should be admitted to a UEFA club competition: first, the club with the highest «club coefficient» (based on the club's results of the previous five years) would be admitted; then, if the club coefficients were the same, the club with the highest «national association coefficient» (based on the previous results of all the teams of a national association) would be admitted; lastly, in case of equal national association coefficients, lots would be drawn.

On 25 June 1998, UEFA informed AEK of the criteria adopted by the UEFA Committee for Club Competitions and of the resulting non-admission of AEK to the UEFA Cup, while Slavia was authorized to compete. The Hellenic Football Association was called upon to enter a substitute for AEK, by designating the club which finished the domestic championship immediately below AEK. In the same letter, UEFA granted AEK a last opportunity to take part in the competition, if it were

to submit a statement confirming a change of control in compliance with the Contested Rule by 1 July 1998 (this was later extended to 20 July 1998).

On 12 June 1998, the parties executed an arbitration agreement, by which they agreed to submit the present dispute to the Court of Arbitration for Sport («CAS») in accordance with the Code of Sports-related Arbitration (the «Code»).

On 15 June 1998, AEK and Slavia filed with the CAS a request for arbitration together with several exhibits, primarily petitioning that the Contested Rule be declared void or annulled (*see infra*, para. 32). On the same day, AEK and Slavia also filed a request for interim relief, petitioning that during the proceedings UEFA be restrained from giving effect to the Contested Rule and, in particular, from excluding either Claimant from the 1998/99 UEFA Cup competition.

UEFA filed its reply to the Claimants' request for interim relief on 26 June 1998 and filed its answer to the request for arbitration, with some exhibits, on 22 July 1998.

On 15 July 1998, the President of the Ordinary Division of CAS held a hearing at the CAS offices in Lausanne, where the parties and their counsel answered questions of fact and law raised by the President and counsel presented oral arguments.

On 16 July 1998, the CAS issued a «Procedural Order on Application for Preliminary Relief», granting the following interim relief:

- «1. For the duration of this arbitration or for the duration of the 1998/99 season of the UEFA Cup, whichever is shorter, the Respondent shall not give effect to the decision taken by its Executive Committee on May 19, 1998 regarding the "Integrity of the UEFA Club Competitions: Independence of the Clubs";
2. As a result, the Respondent shall admit AEK Athens to the 1998/99 UEFA Cup Competition, in addition to Slavia Prague;
3. The costs of the present stage of the proceedings shall be settled in the final award or in any other final disposition of this arbitration».

As a result, AEK and Slavia were allowed to participate in the 1998/99 UEFA Cup (where they were eliminated after winning a few rounds of the competition and did not end up playing each other).

According to the grounds of the interim order, released the following day, the CAS based its decision primarily on the circumstance that UEFA violated its duties of good faith and procedural fairness insofar as it enacted the Contested Rule too late, when the Cup Regulations for the 1998/99 season – containing no restriction for multiple ownership – had already been adopted, and shortly before the start of the 1998/99 season, at a time when ENIC and its clubs could legitimately expect that no restriction was going to be adopted for the said season.

In the interim order the CAS left open for the final award the question whether the Contested Rule could be deemed lawful under competition law and civil law, stating that all findings of fact and legal

assessments were made on a *prima facie* basis, without prejudice to the CAS final award to be rendered after additional factual and legal investigation.

On 23 July 1998, the CAS issued a notice that the CAS Arbitration Panel for the present dispute (hereinafter the «Panel») was constituted in the following composition: Mr. Massimo Coccia as President, Dr. Christoph Vedder as arbitrator appointed by the Claimants and Mr. George Abela as arbitrator appointed by the Respondent.

On 4 September 1998, upon request of the Claimants, pursuant to Article R44.3 of the Code the Panel ordered the Respondent to produce the reports and minutes of the meetings of the UEFA Juridical Committee and of the UEFA Committee for Club Competitions related to the present case. UEFA produced such documents, later providing a few more internal documents upon request of the Claimants.

On 14 September 1998, the CAS issued an order of procedure, detailing the procedural guidelines for the conduct of the arbitration. The order of procedure was accepted and countersigned by both sides. Subsequently, in the course of the proceedings, the Panel supplemented the initial order of procedure with several other orders concerning procedural and evidentiary questions.

On 15 October 1998, the Claimants filed their statement of claim, together with eleven bundles of exhibits. UEFA's response, together with forty exhibits, was submitted to the CAS on 27 November 1998.

On 18 November 1998, the Claimants filed with the CAS a petition pursuant to Article R34 of the Code, challenging the appointment of Mr. George Abela as arbitrator, on the grounds that some circumstances gave rise to legitimate doubts over his independence *vis-à-vis* UEFA, and requesting his removal. On 25 November 1998, Mr. Abela communicated to the CAS that he deemed the Claimants' allegations to be totally unfounded and unjustified; however, because of the very fact that doubts had been expressed regarding his independence and impartiality, for the sake of the CAS he felt that he had to resign from his function as arbitrator in the present case.

On 3 December 1998, the Respondent communicated to the CAS that, in substitution of Mr. Abela, it appointed as arbitrator Dr. Dirk-Reiner Martens. Therefore, the Panel was reconstituted in the new formation comprising Mr. Coccia as President and Messrs. Vedder and Martens as arbitrators. No objection has been raised by either party with respect to the new formation of the Panel.

On 24 December 1998, the Claimants filed with the CAS their reply to UEFA's response. On 1 February 1999, the Respondent filed its rejoinder. Subsequently, on 26 and 28 February 1999, both sides submitted their lists of witnesses and expert witnesses to be summoned to the hearing.

On 12 March 1999, the Panel issued a procedural order detailing directions with respect to the hearing and to the witnesses and experts to be heard.

The hearing was held on 25 and 26 March 1999 at the World Trade Center in Lausanne. The Panel was present, assisted by the *ad hoc* clerk Mr. Stefano Bastianon, attorney-at-law in Busto Arsizio/IT,

and by Mr. Matthieu Reeb, attorney-at-law and counsel to the CAS. The Claimants were represented by Mr. Petros Stathis, General Manager of AEK, and Mr. Vladimir Leska, General Manager of Slavia Prague, assisted by his personal interpreter, and represented and assisted by the following attorneys: Mr. Michael Beloff QC and Mr. Tim Kerr, attorneys-at-law in London/UK (Gray's Inn), Mr. Stephen Kon, Ms. Lesley Farrel and Mr. Tom Usher, attorneys-at-law in London/UK (SJ Berwin), Mr. Jean-Louis Dupont, attorney-at-law in Brussels/BEL, Mr. Marco Niedermann and Mr. Roberto Dallafior, attorneys-at-law in Zurich/CH. The Respondent was represented by Mr. Marcus Studer, Deputy Secretary General of UEFA, and represented and assisted by Mr. Ivan Cherpillod, attorney-at-law in Lausanne/CH, and by Mr. Alasdair Bell, attorney-at-law in Brussels/BEL. With the agreement of all parties two directors of ENIC, Mr. Rasesh Thakkar and (after his testimony had been given) Mr. Daniel Levy, also attended the hearing.

During the two days of hearing the following witnesses and expert witnesses were heard: Mr. Gerald Boon (economist of Deloitte & Touche), Mr. Ivo Trijbits (legal counsel to the Dutch club AFC Ajax NV), Mr. Daniel Levy (managing director of ENIC), Sir John Smith (advisor on security issues to the English Football Association), Lord Kingsland QC (former Member of the European Parliament) and Prof. Paul Weiler (professor of law at Harvard Law School), all called by the Claimants; Mr. Gordon Taylor (chief executive of the Professional Footballers Association) and Prof. Gary Roberts (professor of law at Tulane Law School), called by the Respondent. Each witness and expert witness was invited by the Panel to introduce himself and to tell the truth subject, as to statements related to facts, to the sanctions of perjury in accordance with Article R44.2 of the Code and Articles 307 and 309 of the Swiss Penal Code; each witness and expert witness rendered his testimony and was then examined and cross-examined by the parties and questioned by the Panel.

The parties presented their opening and intermediate statements on 25 March 1999 and their final arguments on 26 March 1999, the Respondent having the floor last in accordance with Article R44.2 of the Code. At the end of the final arguments both sides confirmed their written legal petitions (*infra*, paras. 1 and 4), with counsel for the Claimants also petitioning that the interim stay of the Contested Rule be extended indefinitely and that the award be communicated to the parties on a Friday after the closing of the London stock exchange and rendered public on the following Monday. The parties did not raise with the Panel any objection in respect of their right to be heard and to be treated equally in the present arbitration proceedings.

On 26 March 1999, after the parties' final arguments, the Panel closed the hearing and reserved its final award.

LAW

Parties' legal petitions and basic positions

1. The Claimants presented in their request for arbitration of 15 June 1998 and confirmed in their statement of claim of 15 October 1998 the following legal petitions:

«That it be declared that the resolution of the Executive Committee of the UEFA of 19 May 1998, as notified to the UEFA member associations on 26 May 1998, regarding the Integrity of the UEFA Club Competitions: Independence of the Clubs is void;

eventualiter:

that the resolution of the Executive Committee of the UEFA of 19 May 1998, as notified to the UEFA member associations on 26 May 1998, regarding the Integrity of the UEFA Club Competitions: Independence of the Clubs be annulled;

subeventualiter:

that the Defendant be ordered not to deny now and in the future the admission of the Clubs to the UEFA Club Competitions on the ground that they are under common control; with all costs and compensations to be charged to the Defendant».

At the hearing the Claimants also petitioned that the stay of the Contested Rule ordered by the CAS on 16 July 1998 be extended indefinitely and that the award be notified to the parties on a Friday afternoon and rendered public on the following Monday. The latter petition was subsequently reiterated in writing, with no objection raised by the Respondent.

2. The Claimants argue that the Contested Rule is unlawful because it violates Swiss civil law, European Community (hereinafter «EC») competition law and Swiss competition law, general principles of law, and EC provisions on freedom of establishment and free movement of capital. The Claimants focus their grievances particularly on Paragraph B.3 of the Contested Rule, providing that «in the case of two or more clubs which are under common control, only one may participate in the same UEFA club competition». In summary, they assert the unlawfulness of the Contested Rule on the following ten grounds:
 - (a) *infringement of Swiss civil law* (grounds 1, 2, 3 and 4 of the statement of claim): violation of the UEFA Statutes because of the argued creation of different categories of members; breach of the principle of equal treatment because of discrimination between clubs which are under common control and clubs which are not; disregard of the Claimants' right to be heard; unjustified violation of the Claimants' personality;
 - (b) *infringement of EC competition law* (grounds 5 and 7 of the statement of claim): contravention of Article 85 (now 81) of the EC Treaty, because of an agreement between undertakings which has the object and effect of restricting, distorting and preventing competition and limiting investment within the common market; contravention of Article 86 (now 82) of the EC Treaty, because of an abuse by

- UEFA of its dominant position within the market for the provision of European football and related markets;
- (c) *infringement of Swiss competition law* (grounds 6 and 8 of the statement of claim): contravention of Article 5 of the Swiss Federal Act on cartels, because of an agreement between undertakings significantly affecting competition; contravention of Article 7 of the Swiss Federal Act on cartels, because of an abuse of UEFA's dominant position;
 - (d) *infringement of EC law on freedom of movement* (ground 10 of the statement of claim): contravention of Articles 52 (now 43) and 73 B (now 56) of the EC Treaty, because of restrictions on freedom of establishment and on free movement of capitals;
 - (e) *infringement of general principles of law* (ground 9 of the statement of claim): abuse by UEFA of its regulatory power with the purpose of preserving its position as the dominant organizer of European football competitions.
3. Underlying all such grounds are the Claimants' basic allegations that UEFA's predominant purpose in adopting the Contested Rule has been to preserve its monopolistic control over European football competitions and that a code of ethics would be adequate enough to address the issue of conflict of interests in the event that two commonly owned clubs are to participate in the same UEFA competition.
4. The Respondent submitted both in its answer of 22 July 1998 and in its response of 27 November 1998 the following legal petition:
- «UEFA respectfully requests the Court of Arbitration for Sport to dismiss all the legal petitions submitted by the Claimants, with all costs and compensations to be charged to the Claimants».*
5. The Respondent asserts that each and every legal ground put forward by the Claimants is entirely without merit. In particular, the Respondent asserts that it enacted the Contested Rule with the sole purpose of protecting the integrity of European football competitions and avoiding conflicts of interests. The Respondent argues that a code of ethics would be inadequate to that purpose, whereas the Contested Rule is a balanced and proportionate way of addressing the question, as it deals only with the issue of common control – basing the definition of «control» on EC Directive no. 88/627 (the so-called «Transparency Directive») – rather than with investment in football clubs.

Procedural issues

Jurisdiction of the CAS

6. The CAS has jurisdiction over this dispute on the basis of the arbitration agreement executed by and between the parties on 12 June 1998. Neither side has contested the validity of such arbitration agreement nor raised any objection to the jurisdiction of the CAS over the present dispute.

7. In addition, the Panel notes that the CAS could also be deemed to have jurisdiction under Article 56 of the UEFA Statutes, according to which «CAS shall have exclusive jurisdiction to deal with all civil law disputes (of a pecuniary nature) relating to UEFA matters which arise *between UEFA and Member Associations, clubs, players or officials, and between themselves*» (emphasis added).

Applicable law

8. Pursuant to Article R45 of the Code, the dispute must be decided «*according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law*». The parties agreed at the hearing of 15 July 1998 and confirmed in their briefs that Swiss law governs all issues of association law arising in this arbitration, and that the Panel should apply EC competition law and Swiss competition law if the dispute falls within the scope of these laws.
9. The choice of Swiss law does not raise any questions. Even if the parties had not validly agreed on its application, Swiss civil law would be applicable anyway pursuant to Article R45 of the Code and to Article 59 of the UEFA Statutes, according to which UEFA Statutes are governed in all respects by Swiss law. As to Swiss competition law, an arbitration panel sitting in Switzerland is certainly bound to take into account any relevant Swiss mandatory rules in accordance with Article 18 of the Swiss private international law statute (*Loi fédérale sur le droit international privé* of 18 December 1987, or «LDIP»).
10. With regard to EC competition law, the Panel holds that, even if the parties had not validly agreed on its applicability to this case, it should be taken into account anyway. Indeed, in accordance with Article 19 of the LDIP, an arbitration tribunal sitting in Switzerland must take into consideration also foreign mandatory rules, even of a law different from the one determined through the choice-of-law process, provided that three conditions are met:
 - (a) such rules must belong to that special category of norms which need to be applied irrespective of the law applicable to the merits of the case (so-called *lois d'application immédiate*);
 - (b) there must be a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force;
 - (c) from the point of view of Swiss legal theory and practice, the mandatory rules must aim to protect legitimate interests and crucial values and their application must allow an appropriate decision.
11. The Panel is of the opinion that all such conditions are met and that, pursuant to Article 19 of LDIP, EC competition law has to be taken into account. Firstly, antitrust provisions are often quoted by scholars and judges as fundamental rules typically pertaining to the said category of mandatory rules. Then, the close connection with the case derives from the fact that EC competition law has direct effect in eighteen European countries – fifteen from the European Union and three from the European Economic Area – in whose jurisdiction one can find most of the strongest football clubs taking part in UEFA competitions and, in

particular, one of the Claimants (AEK). Lastly, the Swiss Cartel Law, as is the case with various national competition laws around Europe (well beyond the borders of the said eighteen countries), has been inspired by and modelled on EC competition law; accordingly, the interests and values protected by such EC provisions are shared and supported by the Swiss legal system (as well as by most European legal systems).

12. The Panel notes that the Claimants have argued *inter alia* that UEFA violated the provisions of the EC Treaty on the right of establishment and on free movement of capital, but the parties have not explicitly agreed on the applicability of such provisions to this case. However, for the same reasons outlined with respect to EC competition law (*supra*, paras. 10-11), the Panel holds that it must also take into account EC provisions on freedom of establishment and of movement of capital.

Merits

Relevant circumstances concerning European football

13. Prior to discussing the specific legal issues raised by the parties, the Panel wishes to describe and discuss certain circumstances and situations concerning European football which have to be taken into account with reference to all such legal issues. In particular, the Panel considers it useful to briefly describe the current structure and regulation of football in Europe and to address the issue of the so-called «integrity of the game».
 - a) Regulation and organization of football in Europe
14. In European football there are several private bodies performing regulatory and administrative functions, each of which has different institutional roles, constituencies and goals. Leaving aside the international football federation («FIFA»), which is certainly the body exercising the highest regulatory and supervisory authority worldwide, UEFA is the only regulator of football throughout Europe. UEFA performs its regulatory function with respect to both professional and amateur football, including youth football. For the time being, UEFA is also the only entity organizing pan-European competitions both for club teams and national representative teams. With particular regard to UEFA club competitions, each season the participating clubs are the few top-ranked clubs of each national league, which at the end of a season earn the right to play in the UEFA competitions of the subsequent season. As already mentioned, UEFA organizes the Champions' League, the Cup Winners' Cup (cancelled as of the 1999/2000 season) and the UEFA Cup, with the minor competition Intertoto Cup used also as a qualifier for the UEFA Cup. The competition format has traditionally been the knock-out system based on the aggregate result of one home-match and one away-match (played two weeks later), with away goals and penalty kicks as tie-breakers. Clubs (particularly those investing more) tend to dislike this system because a single unlucky match can be enough to terminate the whole international season, and because there are fewer high-level matches to play. Mainly for this

reason, UEFA has in recent years organized rounds of competition (particularly in the Champions' League) based on small groups of teams playing each other home and away in round-robin fashion, with the top clubs of each group qualifying for the next round. The trend seems to be towards increasing this competition format, reserving the knock-out system only for a few rounds of the competition.

15. Since UEFA is a confederation of fifty-one national football federations, it has below it many football associations and organizations which set rules for their constituent members, in particular clubs and individuals associated with them, and organize and/or oversee all national, regional and local competitions. The structure of European football is often described as a hierarchical pyramid (*see* the EC Commission's «consultation document» drafted by the Directorate General X and entitled *The European model of sport*, Brussels 1999, chapter one).
16. At national level, the primary regulators are the national federations. Each national federation has a wide constituency of regional and local federations, associations, clubs, leagues, and individuals such as players, coaches and referees. National federations are private bodies which pursue the mission – which in some countries is entrusted upon them by national legislation as a form of delegation of governmental powers (as is the case, *e.g.*, in France with Law no. 84-610 of 16 July 1984) – to promote and organize football at all levels and to care for the interests of the whole of the sport and all its members, whether they are involved in the amateur or in the professional game. National federations also organize and manage the national representative teams, selections of the best national players which compete against the other national representative teams in competitions such as the World Cup, the Olympic Games and the European Championship.
17. In the European countries where football is most developed, a very important role is also performed by professional «leagues» (*e.g.*, the «Premier League» in England, the «Liga Nacional de Fútbol Profesional» in Spain or the «Lega Nazionale Professionisti» in Italy). National professional leagues are bodies concerned only with professional football, as their members are only the clubs which participate in the most important national professional championships. They organize and manage yearly, under the jurisdiction of the respective national federation, the highest national professional championship. Such annual championship is traditionally organized in round-robin format, with each club playing against all the other clubs twice, once at home and once away; clubs are awarded points depending upon whether they win (three points), draw (one point) or lose matches (no points), and the club with the highest number of points each season is the champion (usually with no final playoff, differently from other sports). National professional leagues are indeed similar in many respects to trade associations. They exist primarily to protect the interests of their member clubs and to provide them with some services, for instance settling disputes between them and trying to maximize their commercial benefits (*e.g.*, selling collectively some of the television rights) and to minimize their costs (*e.g.*, negotiating with players' associations).

18. Throughout Europe a general trend can be detected towards an increasing independence and autonomy of leagues *vis-à-vis* the national federations; accordingly, tense confrontation between leagues and federations is nowadays not rare. However, thus far leagues are still associated within, and supervised by, the respective national federations – in several countries, this is even mandated by the law – with degrees of autonomy varying from country to country. Due to this system, national football leagues around Europe do not enjoy the absolute independence and autonomy which United States sports leagues enjoy. In addition to other major differences, European professional leagues are not «closed» leagues, and their membership varies slightly each season because at the end of the season some of the bottom-ranked clubs are relegated to the inferior national division and the highest ranked clubs from such division are promoted to the higher national division. This system of relegation and promotion applies more or less in the same way to all the other national and regional divisions and championships below the high-level ones. Consequently, it can happen in European football – as indeed it has done more than just a few times – that amateur or semi-amateur clubs, even from small towns, over the years earn their way up to professional championships and eventually transform into successful professional clubs. This system of promotion and relegation is generally regarded as «one of the key features of the European model of sport» (EC Commission, DG X, *The European model of sport*, Brussels 1999, para. 1.1.2).

19. At pan-European level, no transnational football leagues exist yet. Currently, there is only an association of the main national leagues in Europe, which does not organize any competitions and is basically only a forum for discussion and an instrument of coordination. Recently, a private commercial group («Media Partners») has attempted to create *ex novo* a European football league outside of the UEFA realm and has even notified the EC Commission of a number of draft agreements between Media Partners and eighteen founder clubs – comprising some of the most famous European clubs – concerning the establishment and the administration of two main pan-European football competitions, the «Super League» and the «Pro Cup», involving a total of 132 clubs from all territories covered by UEFA-affiliated national associations (*see Official Journal EC*, 13 March 1999, C 70/5). For the time being this attempt seems to have been aborted, *inter alia* probably because UEFA has modified the organization of its competitions in a way which is certainly pleasing to most important European clubs.

20. As to European football clubs, they are not all shaped in the same legal manner around Europe. Most professional clubs are incorporated as stock companies – and sometimes their shares are even listed on some stock exchanges (*e.g.* Manchester United and several other clubs in England, S.S. Lazio in Italy) –, but there are countries where some or all the clubs are still unincorporated associations with sometimes thousands of members who elect the association’s board (*e.g.* F.C. Barcelona and Real Madrid C.F. in Spain or the German clubs).

21. The above outlined traditional structure of European football might change in the future. In particular, especially after the cited attempt of Media Partners, it might be envisaged that sooner or later there will be in some countries or at a pan-European level some closed (or semi-closed) leagues independent from national federations and from UEFA and modelled

on United States professional leagues. However, for the time being, the above outlined structure still prevails and it is very difficult to compare it to the sports structure in the United States. Not only are there in Europe no closed professional leagues such as the NBA or the NFL, but there are no collegiate competitions such as the NCAA either. As a result, the Panel maintains that although any analysis of United States sports law is very instructive – in this respect the Panel appreciates the parties’ efforts in presenting the views and testimony of renowned experts on this subject – it has limited precedential value for the present dispute and its significance must be weighed very carefully. For example, the Panel considers that to characterize UEFA as a «league» comparable to United States professional leagues, as has been done in some testimony, is factually and legally misplaced and, therefore, potentially misleading for an examination of the present dispute.

b) The «integrity of the game» question

22. Much of the written and oral debate in this case has centred around the question of the «integrity of the game». Both Claimants and Respondent have shown that they are seriously concerned with this question. On the one hand, the Respondent has repeated over and over that it has a specific duty to protect the integrity of the game and that this has been the only motive behind the Contested Rule. On the other hand, the Claimants have expressly stated that they and ENIC accept and espouse the need to preserve sporting integrity, and that they also accept that UEFA has a current responsibility to safeguard the integrity of football in its role as organizer and regulator of European football competition.
23. Several witnesses have stated that the highest standards are needed for the integrity of the game (Mr. Taylor), that the integrity of sports is crucial to the sports consumer (Professor Weiler), and that *«football can only continue to be successful if it is run according to the highest standards of conduct and integrity, both on and off the field»* (Sir John Smith).
24. As concern for the integrity of the game is indeed common ground between the parties, the question is then how «integrity» needs to be defined and characterized in the context of sports in general and football in particular. Part of the debate between the parties has focused on integrity in its typical meaning of honesty and uprightness, and the Claimants have argued, supported by some witnesses (in particular Sir John Smith) for the necessity of a «fit and proper» test in order to vet owners, directors and executives of football clubs before allowing them to hold such positions. The debate has also evidenced the connection between the notion of integrity in football and the need for authenticity and uncertainty of results from both a sporting and an economic angle. Some witnesses have stated that uncertainty of results is the most important objective of football regulators (Mr. Taylor) and the critical element for the business value of football (Mr. Boon).
25. The Panel notes, quite obviously, that honesty and uprightness are fundamental moral qualities that are required in every field of life and of business, and football is no exception. More specifically, however, the Panel is of the opinion that the notion of integrity as applied to football requires something more than mere honesty and uprightness, both from a

sporting and from a business point of view. The Panel considers that integrity, in football, is crucially related to the *authenticity of results*, and has a critical core which is that, in *the public's perception*, both single matches and entire championships must be a true test of the best possible athletic, technical, coaching and management skills of the opposing sides. Due to the high social significance of football in Europe, it is not enough that competing athletes, coaches or managers are in fact honest; the public must perceive that they try their best to win and, in particular, that clubs make management or coaching decisions based on the single objective of their club winning against any other club. This particular requirement is inherent in the nature of sports and, with specific regard to football, is enhanced by the notorious circumstance that European football clubs represent considerably more in emotional terms to fans – the ultimate consumers – than any other form of leisure or of business.

26. The Panel finds *inter alia* confirmation and support for the view that the crucial element of integrity in football is the *public's perception of the authenticity of results* in two documents exhibited by the Claimants, *viz.* the well researched and very insightful reports presented by Sir John Smith to the English Football Association on «Betting on professional football within the professional game» (1997) and on «Football, its values, finances and reputation» (1998). The Smith reports are particularly valuable evidence because they were not prepared specifically for this case. Both reports make quite clear that the most important requirement for football is not honesty in itself or authenticity of results in itself, but rather the public's perception of such honesty and such authenticity.

27. Here are a few excerpts from the Smith reports (with emphasis added):

«public perception dictates that players and others involved in the game should not benefit from their “insider” position»;

«the public has a right to expect that a participant in football will play for his team to win, or make management decisions based on the team winning, as their sole objective. Anything whatsoever that detracts from that prime purpose has to be positively discouraged»;

«even if a result of such a bet is not that a player or official actually intends not to try to win the game, the public's perception of the integrity of the game would be prejudiced in such a situation»;

«the interest of fans in the game would quite rightly not continue at present levels if they had reason to believe that the outcome of any matches was or may be controlled by factors other than personal efforts of those participating in the game, aimed at their team winning»;

«football must preserve its great strength in business terms: the enormous hold which individual clubs have over the loyalty of their supporters. This makes the game attractive to advertisers, sponsors, television and so on. Maintaining that loyalty is not being sentimental; being responsive to spectator concerns is simply good business. That means, amongst other things, being able to reassure supporters that the game is straight».

28. Having clarified what is meant by integrity of the game, the question is then whether multiple ownership of clubs in the context of the same competition has anything to do with

such integrity and, therefore, represents a legitimate concern for a sports regulator and organizer. In other words, can multiple ownership within the same football competition be publicly perceived as affecting the authenticity of sporting results? Can the public perceive a conflict of interest which might contaminate the competitive process when two commonly owned clubs play in the same sporting event?

29. The Claimants have addressed this question mostly from the angle of match-fixing, arguing that it is highly unlikely that a match could be fixed without being detected sooner or later and that, insofar as match-fixing is possible at all, it is also feasible – as has happened on some occasions in the past – with respect to matches between unrelated clubs. In particular, the Claimants have argued that match-fixing necessarily involves complicity by a significant number of people whom, if the truth were discovered, would be ruined and each of whom would, after the event, have a hold over the accomplices. The Claimants have also argued that it is in the interest of a common owner, especially if the common owner is a corporation listed on the stock exchange, that each club does as well as possible on both the economic and sporting level, and that the existing criminal and sporting penalties are sufficient to deal with the risk of match-fixing as well as the perceived risk thereof. The Claimants have supported such arguments with several written statements by players, referees and managers, all essentially asserting in a similar vein that it is almost impossible to fix a football match, that multi-club ownership does not entail any greater threat to sporting integrity than single ownership and that a pledge to respect a «code of ethics» would suffice. Mr. Boon has also testified that multi-club owners would place their entire business at risk if they sought to fix matches and, therefore, this cannot be part of their financial strategy or activity. The Respondent has, in turn, presented some written statements supporting its argument that common ownership is a threat to the integrity of competition and that self-control by multi-club owners through a code of ethics would not be an adequate response to such threat.
30. The Panel is not persuaded that the main problem lies in direct match-fixing (meaning by this the instructions and bribes given to some players so that they lose a match). Indeed, the Panel finds some merit in the Claimants' arguments that direct match-fixing in football is quite difficult (albeit far from impossible, as notorious past cases in France, Italy or other countries demonstrate), that an attempt at direct match-fixing has a fair chance of being detected sooner or later, that any such discovery would eventually harm the multi-club controlling company and that in principle the honesty rate of multi-club owners, directors and executives cannot be any worse than that of single club owners, directors and executives.
31. However, even assuming that no multi-club owner, director or executive will ever try to directly fix the result of a match between their clubs or will ever break the law, the Panel is of the opinion that the question of integrity, as defined, must still be examined, also in the broader context of a whole football season and of a whole football competition. In short, the Panel finds that the main problem lies in the aggregate of three issues that need further analysis: the allocation of resources by the common owner among its clubs, the

administration of the commonly owned clubs in view of a match between them, and the interest of third clubs.

32. The analysis of such issues relies on two assumptions. The first assumption, as already mentioned, is that multi-club owners, directors or executives do not try to directly fix a match and always act in compliance with any laws and with sporting regulations. The second underlying assumption is that the multi-club controlling company's executives are in constant contact with the controlled clubs' own executives and structures, as is normal within a group of companies; in fact, according to EC case law and practice all the companies within a group – parent companies, holding companies, subsidiaries, *etc.* – are considered as a single economic entity (*see e.g.* the EC Commission Notice «on the concept of undertakings concerned», in *Official Journal EC*, 2 March 1998, C 66/14, para. 19). The Panel has indeed been impressed by ENIC's description of its *bona fide* efforts at isolating the management of each of its controlled clubs from the controlling company's and from other clubs' structures. However, the analysis is not to be made with reference to ENIC but with reference to a hypothetical individual, company or group owning two or more football clubs and whose organization might be less careful than ENIC about isolating each controlled club's structure. After all, even ENIC's isolation policy does not seem so strict, as Mr. Boon reports that:

«during the time for completion of this report, I have also noted that employees from ENIC's head office in London have travelled to Greece, Italy, the Czech Republic and Switzerland to impart their industry and cross-club experience to individual clubs controlled by ENIC».

This has been confirmed by Mr. Patrick Comminos, General Manager of AEK, who has stated in his written testimony:

«As general Manager, my contact with the owners of the club is on a daily basis, especially with whichever member of ENIC is in Athens at the time».

Accordingly, the Panel is of the opinion that also the second underlying assumption is appropriate.

33. The first issue is the *allocation of resources by the common owner among its clubs*. Given that in UEFA competitions there is only one sporting winner and there are only a few business winners (the clubs which advance to the last rounds of the competition), and given that a huge amount of money is required in order to keep a football club at the top European level, it would appear to be a waste of resources for a common owner to invest in exactly the same way in two or more clubs participating in the same competition. This is particularly true if the commonly owned clubs are located in different countries (as is generally the case, since at national level there are often rules hindering multiple ownership). After the *Bosman* ruling (EC Court of Justice, Judgement of 15 December 1995, case C-415/93, in *E.C.R.* 1995, I-4921), competition for hiring the top European players is wholly transnational, whereas most of a club's revenues – television rights, game and season tickets, merchandising, advertising and sponsorship – still depend on the national and local markets because of consumer preferences and natural barriers. Therefore, although the costs of creating a team which will potentially be successful in a UEFA competition tend nowadays

to be comparable all over Europe – players’ remuneration being by far the single most important cost for professional clubs – a club’s revenues and rates of return on investments are quite different even with comparable successful sporting results. Revenues and rates of return for football clubs are much higher in a few countries, such as England, France, Germany, Italy and Spain. This explains why the best, and most costly, players always end up in those few countries and why clubs from those countries currently dominate UEFA competitions.

34. The data contained in the economic report presented by Mr. Boon provide ample support for such propositions. As to transnational competition for players and as to their remuneration, Mr. Boon’s research shows that: *«internationally renowned clubs in Europe are willing to compete for the services of leading football players to maintain their successful international position. They are also typically the clubs with the financial resources to do so. ... it costs a significant amount to buy a leading player out of his existing club contract and, typically, to offer the player a premium on his remuneration to entice him to move elsewhere. ... the rate of increase in players’ wages has been nothing short of spectacular in the last five years. In Italy, from 1995/96 to 1996/97 the increase was 24.1% and 35% in the English Premier League».*

Mr. Boon’s report shows also that *«there is an active cross-border European transfer market in which clubs compete for the top players. ... 31% of transfers between major European associations in 1996/97 were cross border».*

With regard to the enormous disparity of revenues between different countries, Mr. Boon reports that *«in 1996/97 the second largest English club (Newcastle) had a turnover of ... \$69.9 million and Juventus’ turnover in Serie A was \$74.1 million; whereas SK Slavia Prague (the number 2 Czech club) had an income of ... \$2.2 million and AEK (one of the top 3 Greek clubs) an income of ... \$4.9 million»* (figures in national currencies have been omitted).

With regard to sporting results deriving from this situation, Mr. Boon confirms the well-known fact that *«there is some polarisation of market power developing within the European market. That polarisation is manifest in that clubs from the larger (and relatively more prosperous) countries with bigger “budgets” for transfers and players’ wages have increasingly come to dominate European competition».*

35. Given the above situation, assuming the viewpoint of the shareholders of a corporation controlling two clubs of different nationality participating in the same UEFA competition, it would certainly be a more efficient and more productive allocation of the available resources (and thus an economically sounder conduct by directors and executives) to allocate them, and thus to allocate the best players, in such a way as to have a «first team», capable of competing at top European level and situated in the richer market, and a «second team» located in the less developed market and which would be useful for, *inter alia*, allowing younger players to gain experience and to be tested with a view to a possible transfer to the first team. The testimony of Mr. Trijbits has given some empirical evidence of this kind of attitude by top rated clubs which acquire interests in clubs of lower rank.

36. The Panel is of the opinion that such differentiated allocation of resources among the commonly owned clubs is in itself perfectly legitimate from an economic point of view, and given its economic soundness it might even be regarded as a duty of the directors *vis-à-vis* the shareholders of the controlling corporation. However, the fans/consumers of the «second club» – which, in order to be eligible for UEFA competitions, is necessarily one of the top clubs of its country, supported in its international matches by most of the football fans of that country – would inevitably perceive that management decisions are not based on the only objective of their club winning against anybody else.
37. Furthermore, even if the different clubs are located in equally profitable (or unprofitable) markets and there is no diverse treatment as a first team and a second team, the common parent company might nevertheless decide, as is usual in a group of companies, to divert resources from one controlled club to another in order to follow wholly legitimate business strategies, for example if the sale of one of the clubs is contemplated. Some examples of such diversion of resources have been provided by Mr. Taylor, who stated in his written testimony:

«When we had common ownership in this country of Oxford United and Derby County by Robert Maxwell there was a transfer of Oxford United's leading players to Derby County at a sum that was less the normal market value and this was very much against the wishes of the then manager of Oxford, Mark Lawrenson. We also had problems regarding Peter Johnson, owner of Tranmere Rovers, moving to Everton and consequent problems with the transfer of monies and questions about the transfer of the goalkeeper from Tranmere to Everton. Similar problems occurred with common ownership by Anton Johnson of Rotherham United and Southern United and there were allegations of asset stripping».

In any event, the Panel is of the opinion that in situations of common ownership, even if a diversion of resources does not really happen, the fans of either club would always be inclined to doubt whether any transfer of players or other management move is decided only in the interest of the club they support rather than in the interest of the other club controlled by the same owner.

38. The second issue is the *administration of commonly owned clubs before a match between them*. It has already been described how shareholders, and thus executives, of the common parent company might have a legitimate economic interest in seeing a given controlled club prevail over another because of the better financial rewards which can be reaped from the success of the first one. In line with the initial assumption, the Panel considers that multi-club owners or executives might favour one club over another without any need to violate the law or to resort to risky attempts of direct match-fixing. In this respect, if a coach (or maybe a club physician) is encouraged or forced to ensure that the best team available is not fielded, it is unclear whether this could meet the definition of match-fixing. However, since there are sporting rules prescribing that clubs always field the best team available – albeit such rules are usually deemed impossible to apply and enforce – and risks (due to the involvement of coaches or physicians) perhaps close to those of direct match-fixing, the Panel does not wish to take into account this hypothetical circumstance in the present analysis.

39. Executives might have various ways of affecting or conditioning the performance of their teams in a given match, or set of matches, without even getting close to violating laws or sporting regulations and without even speaking to players or coaches. A first way might be connected with performance-related bonuses, which are wholly legitimate under any law. As has been evidenced at the hearing, bonuses linked to results in single matches or in entire championships are always a fair portion of players' (and coaches') remuneration, and ENIC clubs are no exception to this practice (Mr. Levy's testimony). In Mr. Boon's written report it is stated that one of the relevant costs associated with a club playing in Europe is «player bonuses for playing and winning UEFA matches». Mr. Boon also testified that all club owners and executives would, understandably, like a larger percentage of the total player remuneration to relate to performance than the percentage which usually applies (10% to 20%). The Panel observes that the widespread practice of bonuses demonstrates that professional players – no differently from other professionals (one can think of contingent fees) – are quite sensitive to incentives. Accordingly, it would be easily possible and perfectly legal for multi-club executives, by adjusting bonuses, to highly motivate the players of one team with suitable incentives and not at all (or much less) the players of the other team.
40. A second way might be connected with players' transfers. Up to a certain point in the football season (nowadays, very late in the season) it is always possible to obtain new players or to let players leave. It is quite easy to induce players to move from a club to another through a wage hike or the opportunity to play in a winning team. Therefore, at any moment before a match between the commonly owned clubs, team rosters could easily change because of management and business needs rather than coaching decisions. One can find in the sporting press plenty of examples of players given away or hired by club owners and executives without the prior consent, and sometimes even without the prior knowledge, of the coaching staff.
41. A third relevant way of influencing the outcome of a match between commonly owned clubs might be connected with «insider information». One team could have, through common executives, access to special knowledge or information about the other team which could give the first team an unfair advantage. There is a relevant difference between widely available information (such as tapes of the other team's official matches or any news which has appeared in the press) and confidential information obtained from a person within the opponent club's structure (*e.g.* with regard to unpublicized injuries, training sessions, planned line-up, match tactics and any other peculiar situation concerning the other team).
42. Another, more trivial, way of conditioning team performances could even be connected with the day-to-day administration of a team in view of a match, particularly of an away match. There are plenty of choices usually made by club executives – *e.g.* with regard to travel, lodging, training, medical care and the like – which may condition either positively or negatively the attitude and performance of professional football players.
43. The third issue concerns *the interest of third clubs*. Whenever competitions have qualification rounds based on groups of teams playing each other home and away in round-robin format, the interest of unrelated third clubs ending up in a qualification group together with two

commonly owned clubs is quite evident. Football history provides unfortunately various instances of matches – even in the World Cup under the eyes of hundreds of millions of television viewers – where both teams needed a draw to the detriment of a third team and in fact obtained such a draw without much effort and without anybody explicitly admitting any agreement afterwards (in fact, probably true agreements were never made, common interest being enough for an unspoken understanding, an «*entente cordiale*»). It is true, this can happen with single owned clubs as well as with commonly owned clubs, but the multi-club owner or executive has additional ways of facilitating an (already easy) unspoken understanding between the teams, for example setting bonuses for drawing higher than, or even equal to, bonuses for winning the match. A third club's interest might also be affected when, before playing the last match or matches of a round-robin group, one of the two commonly owned clubs has already virtually qualified or been eliminated and the other is still struggling; in this case the multi-club owner or executive might be tempted to induce (by the described lawful means) the first club to favour the other club in the last match or matches.

44. As mentioned (*supra*, para. 14), due also to the preferences of the most influential clubs, the current trend in the organization of UEFA competitions (particularly the Champions' League) is more and more towards qualification rounds in round-robin format and, conversely, away from competition rounds played in knock-out format. Such an organizational trend renders this issue particularly delicate, because it increases the need to protect third competitors. Needless to say, even if in fact the outcome of a game between two commonly owned clubs is absolutely genuine, a disadvantaged third club and its fans will inevitably tend to perceive the outcome as unfair.
45. The analysis of the three above issues shows that, even assuming that multi-club owners, directors or executives always act in compliance with the law and do not try to directly fix any match, there are situations when the economic interests of the multi-club owner or parent company are at odds with sporting needs in terms of public perception of the authenticity of results. It may be desirable that multi-club directors and executives safeguard sporting values and act counter to the parent company's wishes and economic interests. However, what about the legitimate economic interests of the shareholders? What about the investors in the stock exchange? Would the shareholders and investors be prepared to accept from a director or an executive the «sporting uncertainty» justification for not having done his/her best, without violating any laws, to promote their economic interests? The Panel is of the opinion that in such a situation there is an inescapable pressure for legitimate (or sometimes «grey-area») behaviour which is in the interest of the controlling company and in the interest of some of the controlled clubs, but not in the interest of *all* the controlled clubs and their fans, or not in the interest of third clubs or football fans in general. As a result, the Panel holds that a problem of *conflict of interest* does exist in multi-club ownership situations.
46. Several sporting bodies and some State legislators have indeed issued rules in order to deal with this question. For example, among European sports bodies there are rules dealing with multi-club ownership in the English Premier League, the English Football League, the Scottish Football Association, and the Spanish football and basketball professional leagues.

In Spain a limit to multi-club ownership in the same competition is prescribed by law: Article 23 of the 1990 Sports Act (*«Ley 10/1990, de 15 de octubre, del Deporte»* as subsequently amended) currently forbids any kind of cross-ownership between Spanish professional clubs and limits the possible direct or indirect shareholding or voting rights in more than one club participating in the same competition to 5%. In Spain, the issue appears to be of particular public awareness because of the case of a well-known entrepreneur who has been suspected and found to hold indirectly, through various companies or figure-heads, shares in various professional football clubs, some of them participating in the same league division. In particular, the Spanish press raised some serious suspicions with regard to the outcome of certain matches between clubs allegedly under common control. Rules prohibiting investment in more than one professional club can also be found in renowned United States sports leagues, such as the National Basketball Association («NBA»), the National Football League («NFL»), the National Hockey League («NHL»), and in baseball the American League and the National League (forming together the Major League Baseball or «MLB») and the minor leagues associated with the National Association of Professional Baseball Leagues («NAPBL»). This attitude by the most important American sports leagues seems to be shared by the United States Court of Appeals for the Second Circuit, which has stated that *«no single owner could engage in professional football for profit without at least one other competing team. **Separate owners for each team are desirable in order to convince the public of the honesty of the competition**»* (Judgement of 27 January 1982, *NASL v. NFL*, 670 F.2d 1249, at 1251, emphasis added).

47. The Panel notes that there is evidence enough showing that a certain number of sports regulators, and some national legislators or judges, perceive that multi-club ownership within the same sporting competition implies a conflict of interest. Even Mr. Karel Van Miert, EC Commissioner for competition policy, has stated before the European Parliament, in reply to written and oral questions posed by some Parliament Members, that *«clearly, if clubs with the same owner can take part in the same competitions, whether national or international, **doubts may arise as to whether the outcome is really undecided in advance**»* (answers given by Mr. Van Miert on behalf of the Commission to parliamentary questions nos. E-3980/97, 0538/98, P-2361/98, emphasis added).

In his testimony, Professor Weiler characterized this conflict of interest issue as an «illusion» and counsel for the Claimants picked up and utilized such locution in the course of the final oral argument. The Panel is of the opinion that, even assuming (but not conceding) that there is no true conflict of interest, it must be acknowledged that «clearly ... doubts may arise» (as put by Mr. Van Miert). The mere fact that some knowledgeable authorities like sports regulators, national legislators or judges, and European commissioners are under such «illusion» proves that the general public – the consumers – might also easily fall under an analogous «illusion». After all, even Professor Weiler himself, a couple of years before studying in depth the issue of multi-club ownership in order to be an expert witness before this Panel, wrote that *«from the point of view of the League as a whole, there are also significant potential advantages from assigning control and responsibility for individual teams to an identifiable owner. On the playing field or court, **this reinforces the impression among fans that their favored team is fully committed to winning all its games.** ... With respect to business decisions made off the field, separate*

ownership and control of individual teams may be more likely to enhance the team's appeal and extract the revenues available in its local market» (WEILER, Establishment of a European League, in FIBA International Legal Symposium (June 1997), Bilbao 1999, 77, at 87-88).

Therefore, the perception of an inherent conflict of interest in multi-club ownership within the same championship or competition seems wholly reasonable.

48. As a result, the Panel finds that, when commonly controlled clubs participate in the same competition, the *«public's perception will be that there is a conflict of interest potentially affecting the authenticity of results»*. This reasonable public perception, in the light of the above characterization of the integrity question within football (*see supra*, paras. 25-27), is enough to justify some concern, also in view of the fact that many football results are subject to betting and are inserted into football pools all over Europe. This finding in itself, obviously, does not render the Contested Rule admissible under the different principles and rules of law which still have to be analyzed. At this stage of its findings, the Panel merely concludes that ownership of multiple clubs competing in the same competition represents a justified concern for a sports regulator and organizer.

Swiss civil law

49. The Claimants argue that the Contested Rule is unlawful under Swiss civil law because of the procedure by which it was adopted and for reasons of substance. With respect to procedural grounds, the Claimants assert that in adopting and enforcing the Contested Rule the Respondent (1) violated the UEFA Statutes by creating different categories of members, and (2) failed to observe fair procedures, disregarding in particular the clubs' right to a legal hearing. As to substantive grounds, the Claimants assert that the Respondent (3) infringed the principle of equal treatment by discriminating between clubs which are under common control and clubs which are not, and (4) violated without justification the personality of the clubs. The Respondent rejects all such claims.
- a) Compliance with UEFA Statutes
50. Article 75 CC provides that a resolution taken by an organ of an association which contravenes the law or the association statutes can be judicially challenged by any member of the association who has not approved it.
51. The Claimants argue that they should be considered as «indirect members» of UEFA because they are members of the respective national associations (*i.e.* federations) which, in turn, are members of UEFA. Therefore, they claim that UEFA violated its own Statutes insofar as the Executive Committee created different categories of clubs – clubs under common control *vis-à-vis* clubs which are not – and thus different categories of indirect members, without the power to do so (as the creation of different categories of members would require an amendment to the Statutes, which can be done only by the UEFA

Congress). In response, UEFA points out that the national federations rather than the clubs are its members and that, in any event, it did not create different membership categories but it merely amended the conditions of admission to UEFA club competitions in order to eliminate conflict of interest situations.

52. The Panel is not persuaded that clubs could be considered «indirect members» of UEFA. Art. 65.1 CC provides that the general assembly of a Swiss association is competent to decide on the admission of its members. If clubs had a right to be considered (indirect) members of UEFA because they are affiliated to their national federation, they evidently would acquire such status through a decision of such national federation, that is a body which surely is not the competent general assembly – the UEFA Congress – and this would be hardly compatible with Article 65.1 CC. Moreover, Article 5.1 of the UEFA Statutes, entitled «Membership», establishes that «membership of UEFA is open only to national football associations situated in the continent of Europe who are responsible for the organization and implementation of football-related matters in their particular territory»; clearly clubs do not meet these requirements. Clubs are not ignored by the Statutes, as they are mentioned in several provisions (Articles 1, 7, 23, 45, 46, 49, 54, 55 and 56) but without any hint of them being considered indirect members. The UEFA Statutes attribute voting rights only to national federations, and Article 75 CC refers to members which have voting rights within the association whose resolution is challenged. Clubs are affiliated to and may have membership and voting rights within their national federations, where they can elect the federation’s board and president, who represents the national federation and thus all the national clubs within UEFA. Within the national federations there are indeed different categories of clubs – *e.g.* female and male clubs, amateur and professional clubs – but this depends only on provisions included in the statutes of the national federations.
53. In any event, even assuming that the clubs could be regarded as indirect members of UEFA, the Panel does not see in the Contested Rule any creation of different categories of member clubs but rather the establishment of conditions of participation in UEFA competitions. Among such conditions are also, for example, stadium safety requirements (Articles 3 and 8 of the 1998/99 Regulation of the UEFA Cup and the related booklet; *see supra*, para. 8). Applying the Claimants’ rationale, this would imply the creation of different categories of clubs, those with an adequate stadium and those without. In other words, any condition of admission to a competition could be interpreted as a creation of categories of clubs. The Panel considers that there is a substantial difference between «club categories» and «conditions of participation». On the one hand, the notion of category implies a club’s formal and steady status, which is prerequisite for any kind of competition (national or international) in which that club takes part, and which is modifiable only through given formal procedures (*e.g.*, the transformation of an amateur club into a professional one, or *vice versa*). On the other hand, the notion of «conditions of participation» implies more volatile requirements which are checked when, and only when, a club enters a given competition, and which are often specific to that competition (*e.g.*, in order to compete in some national championships, clubs must provide financial guarantees which are different in type and amount from country to country; at the same time, in order to compete in, say, the Greek

championship it is absolutely irrelevant that the owner of a participating club controls other clubs abroad).

54. Article 46.1 of the UEFA Statutes provides that the «*Executive Committee shall draw up regulations governing the conditions of participation in and the staging of UEFA competitions*». As the UEFA Statutes confer to the Executive Committee the power to enact rules concerning conditions of participation in a UEFA competition, the Panel holds that in adopting the Contested Rule the UEFA Executive Committee did not act *ultra vires*, and thus UEFA did not violate its own Statutes.
- b) Right to a legal hearing and to fair procedures
55. The Claimants argue that, under Article 75 CC, members of an association have the right to be heard when resolutions are passed which affect them to a significant extent. Therefore, the Claimants assert that, being indirect members of UEFA, they were entitled to a legal hearing before the adoption of the Contested Rule, and that UEFA therefore infringed the principle *audiatur et altera pars*. More generally, the Claimants assert that association members have a right to fair procedures, and that *inter alia* the Respondent adopted the Contested Rule too shortly before the start of the new season. The Respondent replies by insisting that the clubs are not indirect members of UEFA and by asserting that it acted strictly in accordance with its statutory regulations and that AEK had enough time to adjust to the Contested Rule.
56. The Panel notes that the Claimants base this ground, like the previous one, on the assumption that clubs are «indirect» members of UEFA, because they are affiliated to their respective national federations which in turn are members of UEFA. For the reasons already stated, the Panel is not persuaded by this construction. The Panel finds the argument even less persuasive if such characterization of the clubs as indirect members implies, as the Claimants argue, the necessary consequence that *every indirect member* should be heard by UEFA before passing a resolution which could affect such indirect member. This would mean that, if a resolution affects amateur clubs, UEFA should consult with tens (perhaps even hundreds) of thousands of clubs. As all players, coaches and referees are also affiliated to their national federations – millions of individuals throughout Europe –, they could also claim to be indirect members and every one of them could request that he/she be heard by UEFA. Even if one was to limit the right to be heard only to clubs potentially interested in UEFA competitions – *i.e.* all clubs competing in the highest championship of every UEFA member federation – there would still be hundreds of clubs to be consulted. For an international federation, this would amount to a procedural nightmare and would paralyze any possibility of enacting regulations. The Panel maintains that the consequence is so absurd that the reasoning is fallacious.
57. In any event, even assuming that for some purposes clubs could be considered as indirect members of UEFA, the Panel is of the opinion that «indirect» members could not be wholly equated with «direct» members. Therefore, clubs could not claim anyway the right to be

heard when general resolutions are adopted by UEFA. It is certainly opportune that UEFA consults with at least some of the clubs, or possibly with some of the national leagues, before adopting rules concerning conditions of admission to its competitions, but in the Panel's view this cannot be construed as a legal obligation under Swiss association law.

58. With regard to the right to be heard, the Panel wishes to stress that the CAS has always protected the principle *audiatur et altera pars* in connection with any proceedings, measures or disciplinary actions taken by an international federation *vis-à-vis* a national federation, a club or an athlete (*see* CAS 91/53 *G. v. FEI*, award of 15 January 1992, in M. REEB [ed.], *Digest of CAS Awards 1986-1998*, Berne 1998, 87, paras. 11-12; CAS 94/129 *USA Shooting & Q. v. UIT*, award of 23 May 1995, *ibidem*, 203, paras. 58-59; CAS OG 96/005, award of 1 August 1996, *ibidem*, 400, paras. 7-9). However, there is a very important difference between the adoption by a federation of an *ad hoc* administrative or disciplinary decision directly and individually addressed to designated associations, teams or athletes and the adoption of a general regulation directed at laying down rules of conduct generally applicable to all current or future situations of the kind described in the regulation. It is the same difference that one can find in every legal system between an administrative measure or a penalty decided by an executive or judicial body concerned with a limited and identified number of designees and a general act of a normative character adopted by the parliament or the government for general application to categories of persons envisaged both in the abstract and as a whole. The Panel remarks that there is an evident analogy between sports-governing bodies and governmental bodies with respect to their role and functions as regulatory, administrative and sanctioning entities, and that similar principles should govern their actions. Therefore, the Panel finds that, unless there are specific rules to the contrary, only in the event of administrative measures or penalties adopted by a sports-governing body with regard to a limited and identified number of designees could there be a right to a legal hearing. For a regulator or legislator, it appears to be advisable and good practice to acquire as much information as possible and to hear the views of potentially affected people before issuing general regulations – one can think of, *e.g.*, parliamentary hearings with experts or interest groups – but it is not a legal requirement. As a United States court has stated, requiring an international sports federation «*to provide for hearings to any party potentially affected adversely by its rule-making authority could quite conceivably subject the [international federation] to a quagmire of administrative red tape which would effectively preclude it from acting at all to promote the game*» (*Gunter Harz Sports v. USTA*, 1981, 511 F. Supp. 1103, at 1122).
59. Furthermore, in any event, the Panel observes that ENIC – clearly being the most interested party and evidently representing also the Claimants – was in fact heard by UEFA at a meeting held on 24 February 1998 (*supra*, para 6). In a letter from Mr. Hersov of ENIC (enclosing the proposed *Code of Ethics*) sent on the following day to Mr. Studer of UEFA, it is possible to read *inter alia*:

«*...We appreciated your and Marcel's open and frank discussion with us, and the mutual recognition of UEFA and ENIC's interests, objectives and concerns. From UEFA's perspective, the sanctity of the game and the various European competitions are paramount. You are also under some pressure to be seen to be responding responsibly to members concerns, and we appreciate and recognize this pressure. ... We feel that the proposed rule change banning teams with common ownership from competing*

in the same competition would be extremely damaging to ENIC. Its implementation would be very harmful to ENIC and it would materially impact the clubs which we currently own ...» (emphasis added).

Hence, at the meeting of 24 February 1998 UEFA did raise the issue of a rule such as the Contested Rule being contemplated and the Claimants in fact had a possibility, through their common parent company ENIC, of expressing their opinion to UEFA and of making very clear their dissatisfaction with the envisaged new rule on multi-club ownership and the potential damage deriving therefrom. For all the above reasons, the Panel holds that the Respondent did not infringe the principle *audiatur et altera pars* and did not violate any right to be heard in adopting the Contested Rule.

60. With regard to the more general requirement of respecting fair procedures, however, the Panel considers that this is a principle which must always be followed by a Swiss association even *vis-à-vis* non-members of the association if such non-members may be affected by the decision adopted. In this respect, the Panel notes that the President of the Ordinary Division of the CAS based its interim order of 16-17 July 1998 on the circumstance that UEFA violated the principle of procedural fairness. The Panel agrees with the President's view that UEFA adopted the Contested Rule too late, when the Cup Regulations for the 1998/99 season, containing no restriction for multiple ownership, had already been issued. In the CAS interim order it was observed *inter alia*:

«By adopting the Regulation to be effective at the start of the new season, UEFA added an extra requirement for admission to the UEFA Cup after the conditions for participation had been finally settled and communicated to all members. It did so at a time when AEK already knew that it had met the requirements for selection of its national association. Furthermore, it chose a timing that made it materially impossible for the clubs and their owner to adjust to the new admission requirement. ...

The doctrine of venire contra factum proprium ... provides that, where the conduct of one party has led to the legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party ...

By referring to this doctrine, CAS is not implying that UEFA is barred from changing its Cup Regulations for the future (provided, of course, the change is lawful on its merits). However, it may not do so without allowing the clubs sufficient time to adapt their operations to the new rules, here specifically to change their control structure accordingly».

61. The Panel essentially agrees with the foregoing remarks by the President of the Ordinary Division of the CAS and with the ensuing conclusion that UEFA violated its duties of procedural fairness with respect to the 1998/99 season. Indeed, a sports-governing organization such as an international federation must comply with certain basic principles of procedural fairness *vis-à-vis* the clubs or the athletes, even if clubs and athletes are not members of the international federation (*see* the Swiss Supreme Court decision in the *Grossen* case, in ATF 121 III 350; *see also infra*). The Panel does not find a hurried change in participation requirements shortly before the beginning of the new season, after such requirements have been publicly announced and the clubs entitled to compete have already been designated, admissible. Therefore, the Panel approves and ratifies the CAS Procedural

Order of 16 July 1998, which has granted interim relief consisting in the suspension of the application of the Contested Rule «*for the duration of this arbitration or for the duration of the 1998/99 season of the UEFA Cup, whichever is shorter*».

62. The Panel observes that the above conclusion does not require that the Contested Rule be annulled on procedural grounds, given that the lawfulness of the Contested Rule must be evaluated on its merits with respect to all future football seasons. In the Panel's view, if the Contested Rule would be found to violate any of the substantive rules and principles of Swiss and/or EC law invoked by the Claimants, no amount of procedural fairness could save it; conversely, if the Contested Rule would not be found to infringe such rules and principles, a minor lack of procedural protection could not render it unlawful *per se*. Therefore, while approving the interim stay of the Contested Rule, the Panel holds that UEFA's procedural unfairness concerning the timing of the new rule's entry into force is of a transitory nature and, as a result, it is not such as to render the Contested Rule unlawful on its merits with respect to all future football seasons. The Claimants' request to annul the Contested Rule on this procedural ground is thus rejected. However, as will be seen *infra*, the said procedural defect will have some consequences with respect to the temporal effects of this award.
- c) Principle of equal treatment
63. The Claimants remind that Article 75 CC also protects members of a Swiss association against resolutions which infringe the principle of equal treatment of the association's members and, therefore, argue that the Contested Rule violates the corresponding rights of the Claimants. In particular, the Claimants assert that UEFA formed different categories of members and violated the principle of relative equality because it established membership distinctions – clubs commonly controlled *vis-à-vis* the other clubs – in an arbitrary manner. The Claimants argue that there are no substantial objective grounds which UEFA could invoke to justify the unequal treatment provided by the Contested Rule because the Contested Rule is neither necessary, nor appropriate and, in addition, fails the test of proportionality insofar as it is a disproportionate means of achieving the objective of protecting the integrity of UEFA competitions. In reply, the Respondent argues that the principle of equal treatment does not prevent differentiation between objectively different situations, that the common control of clubs is an objectively relevant factor, and that in any event the Contested Rule is a proportionate response to the need to protect the integrity of the game.
64. The Panel notes that this argument is also based on the assumption that clubs are indirect members of UEFA, as under Article 75 CC only association members can judicially challenge a resolution infringing their right to equal treatment. The Panel has already disavowed such construction of the clubs' status within UEFA and here refers to the views previously stated in this respect (*see supra*, paras. 52 and 56).

65. The Panel has also already expressed the opinion that, even assuming that the clubs could be regarded as indirect members of UEFA, the Contested Rule did not create different categories of clubs but rather established an additional condition of participation in UEFA competitions (*see supra*, para. 53). The Panel does not find any discrimination or unequal treatment in establishing conditions of participation which are applicable to all clubs. It seems to the Panel that there is no discrimination in denying admission to a club whose owner is objectively in a conflict of interest situation; likewise, *e.g.*, there is no discrimination in denying admission to a club whose stadium is objectively below the required safety standards. In both cases, if the shareholding structure or the safety conditions are modified, the club is admitted to the UEFA competition. Therefore, the Contested Rule does not target or single out specific clubs as such but simply sets forth objective requirements for all clubs willing to participate in UEFA competitions.
66. As a result, the Panel holds that the Contested Rule does not violate the principle of equal treatment. Since the proportionality test is supposed to be applied only in order to verify whether an unequal treatment is justified, it is not necessary to rule on the proportionality issue in connection with this ground. In any event, the Panel observes that the discussion on proportionality developed under Article 81 (*ex 85*) of the EC Treaty (*infra*, paras. 131-136) could be applied in its entirety to this ground as well.

d) Personality of the clubs

67. The Claimants argue that the Contested Rule is not compatible with Article 28 CC, which reads as follows:

«1. Celui qui subit une atteinte illicite à sa personnalité peut agir en justice pour sa protection contre toute personne qui y participe. 2. Une atteinte est illicite, à moins qu'elle ne soit justifiée par le consentement de la victime, par un intérêt prépondérant privé ou public, ou par la loi» («1. A person who is unlawfully injured in his personality may bring proceedings for protection against any party to such injury. 2. Such injury is unlawful unless it is justified by consent of the injured person, by an overriding private or public interest, or by the law»).

The Claimants assert that Article 28 CC applies both to individuals and to corporate legal entities, and that the development of both the sporting and economic personality of commonly owned clubs would be impaired as a consequence of the non-admission to a UEFA competition. The Respondent argues that Article 28 CC has no relevance at all because it is applicable to different types of situations, and that in any event UEFA pursued overriding interests in enacting the Contested Rule.

68. The Panel is not persuaded that Article 28 CC could be applied to the case at stake. The notion of «personality» (or of «personhood») is to be characterized by reference to the fundamental attributes which every person, and in some measure every legal entity such as an association or a corporation, has a right to see protected against external intrusion and interference. It is difficult to find definitions in the abstract as there is an indefinite number of liberties, varying from time to time and from country to country, which can be

encompassed within the concept of personality rights. Examples are core rights related to privacy, name and personal identity, physical integrity, image, reputation, marriage, family life, sexual life and the like.

69. Swiss case law has sometimes stretched the notion of personality rights in order to protect a wider number of rights, such as the right to be economically active and even the freedom of performing sporting activities. The Claimants argue that the present dispute can be compared to the *Gasser* case, concerning the two-year exclusion of an athlete from any kind of competition due to a doping offence. In the *Gasser* case, the judge considered as a personality right the athlete's freedom of action and freedom of physical movement and, therefore, «*the freedom of performing sporting activities and of participating in a competition between athletes of the same level*» (Office of Judge III, Berne, Decision of 22 December 1987, in *SJZ*, 1988, 84 at 87). However, the Panel finds the *Gasser* case quite different from, and thus of no precedential value for, the present dispute. Indeed, the Contested Rule is a general regulation establishing a condition of participation applicable to all clubs (*see supra*, paras. 53 and 58) and not, as in the *Gasser* case, a disciplinary measure individually addressed to a designated athlete. Accordingly, the Contested Rule as such cannot be considered an exclusionary sanction within the meaning of the *Gasser* ruling. Moreover, the Contested Rule sets forth a condition for access to a single competition rather than an absolute exclusion from all sporting activities. The Panel considers that, while an unfairly adopted long doping ban might harm the whole sporting career of an athlete, and thus his/her personality, a club's non-participation in a UEFA competition would involve some loss of income but, since the club would still take part in other important football competitions such as the national championship and the national cup (which are competitions appreciated by fans and economically rewarding, as will be seen *infra* at para. 131), its «personality» would not be affected. In any event, even a restriction of a personality right could be justified by an «overriding private or public interest» (Article 28.2 CC), and the Panel is of the opinion that the public's perception of a conflict of interest potentially affecting the authenticity of results (*see supra*, para. 48) would constitute such an «overriding interest».
70. The Claimants have also made reference to Swiss judgements limiting an association's right to exclude a member, pursuant to Article 72.2 CC, in situations where the exclusion would injure the personality of the member concerned. Swiss courts have applied this doctrine to associations which hold monopolistic positions, such as professional associations or sports federations. However, apart from the illustrated difficulty of considering the Claimants as (indirect) members of UEFA (*see supra*, paras. 52 and 56), the Panel observes that non-admission to a competition cannot be equated to the loss of membership due to expulsion from an association and, therefore, cannot be considered as an injury to personality. In any event, even if one were to admit that the effects of the Contested Rule could be compared to an actual exclusion from membership, according to Swiss case law this could always be justified if there is «good cause» (Swiss Federal Court, Decision of 14 March 1997, in *SCP* 123 III, 193). The Panel is of the opinion that the public's perception of a conflict of interest potentially affecting the authenticity of results (*see supra*, para. 48) would constitute «good cause». In conclusion, the Panel holds that the Contested Rule does not violate Article 28 CC.

European Community competition law

a) Introductory remarks

71. Article 81.1 (*ex* 85.1) of the EC Treaty prohibits *«as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market»*.

Under Article 81.2 (*ex* 85.2) *«any agreements or decisions prohibited pursuant to this Article shall be automatically void»*.

Under Article 82 (*ex* 86) of the EC Treaty *«any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States»*.

72. According to the EC Commission's «Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty» (in *Official Journal EC*, 13 February 1993, C 39/6), before ascertaining whether there is an infringement of the prohibitions laid down in Article 85.1 (now 81.1) or 86 (now 82), national courts (and thus arbitrators) *«should ascertain whether the agreement, decision or concerted practice has already been the subject of a decision, opinion or other official statement issued by an administrative authority and in particular by the Commission. Such statements provide national courts with significant information for reaching a judgement, even if they are not formally bound by them»* (*ibidem*, para. 20).

73. The Panel is not aware of any decision, opinion or other official statement issued by the Commission or other administrative authority with regard to the Contested Rule. However, as already mentioned (*supra*, para. 47), there have been a few replies by the Commission under Article 197 (*ex* 140) of the EC Treaty to questions specifically devoted to the Contested Rule put to it by some Members of the European Parliament (questions nos. E-3980/97, 0538/98, P-2361/98). The wording of all such replies is similar or identical. In the answer given on 3 September 1998 (*Official Journal EC*, 1999, C 50/143), the EC Commissioner responsible for competition policy Mr. Van Miert, answering on behalf of the Commission, has stated as follows:

«The Commission is aware that the Union of European football associations (UEFA) has recently adopted rules that regulate the participation in European competitions of clubs belonging to the same owner. It seems at first sight that these rules have a sporting nature and that they aim to preserve uncertainty of results, an objective which the Court of Justice has recognised as legitimate in its judgement of 15 December 1995 in the Bosman case. Clearly, if clubs with the same owner can take part in the same competitions, whether national or international, doubts may arise as to whether the outcome is really undecided in advance. Nevertheless, it is necessary to determine whether these UEFA rules are limited to what is strictly necessary to attain the objective of ensuring the uncertainty as to results or whether there exist less restrictive means to achieve it. Provided that such rules remain in proportion to the sporting objective pursued, they would not be covered by the competition rules laid down in the EC Treaty. At this stage, the Commission does not possess all the

necessary information to assess the compatibility of the rules with Articles 85 and 86 of the EC Treaty. Whether UEFA has or not consulted other bodies is not relevant for this assessment».

74. The Respondent has attributed great weight to this statement, while the Claimants have underlined that it has no legal force whatsoever and that anyway it provides no answer to the question of whether the Contested Rule is compatible with the EC Treaty. The Panel is not sure whether an answer given by the Commission in the European Parliament can be regarded as a «decision, opinion or other official statement» within the meaning of the above-mentioned Commission Notice. Probably, the Commission did not have in mind answers to parliamentary questions when it drafted the Notice, and its reference to *official* statements would imply a less informal statement than a parliamentary one. In any event, since Mr. Van Miert's answer is quite concise and given without the Commission «*possess[ing] all the necessary information to assess the compatibility of the rules with Articles 85 and 86 of the EC Treaty*», and since any statement issued in the Parliament inevitably has a political rather than a legal nuance, the Panel is of the opinion that it should not base this award on Mr. Van Miert's answer.
75. The Panel also notes that the EC Commission has recently issued a more general statement with regard to the application of competition rules to sport. The Commission has publicly noted as follows: «*Sport comprises two levels of activity: on the one hand the sporting activity strictly speaking, which fulfils a social, integrating and cultural role that must be preserved and to which in theory the competition rules of the EC Treaty do not apply. On the other hand a series of economic activities generated by the sporting activity, to which the competition rules of the EC Treaty apply, albeit taking into account the specific requirements of this sector. The interdependence and indeed the overlap between these two levels render the application of competition rules more complex. Sport also has features, in particular the interdependence of competitors and the need to guarantee the uncertainty of results of competitions, which could justify that sporting organizations implement a specific framework, in particular on the markets for the production and the sale of sports events. However, these specific features do not warrant an automatic exemption from the EU competition rules of any economic activities generated by sport, due in particular to the increasing economic weight of such activities*» (EC Commission, Press Release no. IP/99/133, 24 February 1999).
76. The Panel shares the EC Commission's position that the application of competition rules to sports regulations is a particularly complex task because of the peculiarities of sport and because of the inescapable link between sporting and economic aspects. Therefore, all the relevant elements of competition law have to be carefully weighed in this award together with the peculiar sporting elements, in order to ascertain whether the Contested Rule violates Articles 81 (*ex* 85) and 82 (*ex* 86) of the EC Treaty or not.
- b) Position of the parties
77. With respect to Article 81 (*ex* 85) of the EC Treaty, the Claimants assert, firstly, that the Contested Rule is a decision by an association of undertakings, and/or an agreement between undertakings, falling within the scope of such provision. Then, they argue that the

Contested Rule has the effect of both actually and potentially affecting competition to an appreciable extent in the football market, and in various ancillary football services markets, by preventing or restricting investments by multi-club owners in European clubs, by changing the nature, intensity and patterns of competition between commonly controlled clubs and the others, and by enhancing the economic imbalance between football clubs. They also assert that the Contested Rule affects the pattern of trade between Member States. They also argue that no «sporting exception» could be applied to this issue, that the Contested Rule is unnecessary and disproportionate to the professed objective, and that less restrictive alternatives exist. For these reasons, the Claimants contend that the Contested Rule is incompatible with Article 81.1 and, as no exemption has been given by the EC Commission under Article 81.3, it is automatically void pursuant to Article 81.2. The Respondent counter-argues that the Contested Rule is not caught by Article 81, or by any other provision of the EC Treaty, because it is a rule of sporting interest only, which is proportionate to the legitimate objective of preventing situations of conflict of interest and, thus, of promoting and ensuring genuine competition between the clubs playing in pan-European competitions.

78. With respect to Article 82 (*ex* 86), the Claimants argue that UEFA is the only body empowered to organize European competitions and, consequently, holds a dominant position in the European professional football market and the ancillary football services markets. Then, they assert that the Contested Rule constitutes an abuse by UEFA of its dominant position contrary to Article 82 because, without any objective justification, it restricts competition, it is unnecessary and disproportionate, and it unfairly discriminates between clubs with different ownership structures. The Respondent replies by denying that it is in a dominant position, and by asserting that the adoption of a rule in order to preserve the integrity of club competitions could not amount to an abuse.

c) The «sporting exception»

79. The Respondent argues that the Contested Rule is not caught at all by EC law, because it is a rule of a merely sporting character purporting to protect the integrity of the game by preventing any conflict of interest within UEFA club competitions. The Respondent refers to what has come to be termed as the «sporting exception», after the EC Court of Justice stated in the *Walrave* and *Donà* cases that «*the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty*» (Judgements of 12 December 1974, case 36/74, *Walrave*, in *E.C.R.* 1974, 1405, para. 4; 14 July 1976, case 13/76, *Donà*, in *E.C.R.* 1976, 1333, para. 12), that EC law «*does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity*» (*Walrave*, para. 8), and that EC law does not «*prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries*» (*Donà*, para. 14).

In both cases, the Court also added that the «restriction on the scope of the provisions in question must however remain limited to its proper objective» (*Walrave*, para. 9; *Donà*, para. 15).

80. In the more recent *Bosman* case, the Court of Justice referred to the *Walrave* and *Donà* precedents in order to reiterate that «sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty» (Judgement of 15 December 1995, case C-415/93, *Bosman*, in E.C.R. 1995, I-4921, para. 73), and that «the provisions of Community law concerning freedom of movement of persons and of provision of services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches. It stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of the sporting activity from the scope of the Treaty» (*ibidem*, para. 76).

81. The Claimants acknowledge that some matters concerned with the rules of the game would fall within the so-called sporting exception, mentioning as examples «a ban on drugs, the size of the pitch or the ball, or the methods of selection of national teams». However, the Claimants deny that the Contested Rule might fall within such an exception because it is economic in its language, its subject matter and its effects. In the final oral argument, counsel for the Claimants vividly described the Contested Rule as «impregnated» with economic elements.

82. The Panel observes that it is quite difficult to deduce the extent of the «sporting exception» from the mentioned case law of the Court of Justice. It is clear that a sporting exception of some kind does exist, in the sense that some sporting rules or practices are somewhat capable of, as the Court puts it, «restricting the scope» of EC provisions. In the light of the Court's jurisprudence, it seems that a sporting rule should pass the following tests in order not to be caught by EC law: (a) it must concern a question of sporting interest having nothing to do with economic activity, (b) it must be justified on non-economic grounds, (c) it must be related to the particular nature or context of certain competitions, and (d) it must remain limited to its proper objective.

83. With regard to test (a), the Contested Rule certainly concerns a question of great sporting interest, such as the integrity of the game within the already illustrated meaning of the public perception of the authenticity of sporting results (*see supra*, para. 24 *et seq.*). However, the Contested Rule also has a lot to do with economic activity. Indeed, the Contested Rule addresses the question of ownership of clubs taking part in UEFA competitions, that is the economic status of clubs which certainly perform economic activities (*see infra*, para. 88). Therefore, the requirement of test (a) is not met, and the Panel holds that the Contested Rule is not covered by the «sporting exception». As a consequence, tests (b), (c) and (d) are not relevant in this context, and the Panel need not discuss them.

84. In the light also of the recent opinions of Advocate General Cosmas in the pending *Delière* case (opinion delivered on 18 May 1999, joint cases C-51/96 and C-191/97) and of Advocate General Alber in the pending *Lehtonen* case (opinion delivered on 22 June 1999, case C-176/96), the Panel wonders whether, applying the Court of Justice tests, it is really

possible to distinguish between sporting questions and economic ones and to find sporting rules clearly falling within the «sporting exception» (besides those expressly indicated by the Court, concerning national teams). For instance, among the examples indicated by the Claimants, the reference to anti-doping rules might be misplaced, because to prevent a professional athlete – *i.e.* an individual who is a worker or a provider of services – from performing his/her professional activity undoubtedly has a lot to do with the economic aspects of sports. The same applies to the size of sporting balls, which is certainly of great concern to the various firms producing them. In conclusion, the Panel is not convinced that existing EC case law provides a workable «sporting exception» and it must, therefore, proceed with a full analysis of the present dispute under Articles 81 (*ex* 85) and 82 (*ex* 86) of the EC Treaty.

d) Undertakings and association of undertakings

85. Article 81.1 (*ex* 85.1) of the EC Treaty prohibits any cooperation or coordination between independent undertakings which may affect trade between Member States and which has the object or the effect of preventing, restricting or distorting competition. Such forbidden cooperation or coordination between undertakings may be accomplished through agreements, decisions by associations of undertakings or concerted practices. Article 82 (*ex* 86) of the EC Treaty prohibits any abuse of a dominant position by one or more undertakings which may affect trade between Member States. Both provisions, in order to be applied, require that the Panel ascertain whether the Respondent can be regarded as an undertaking and/or an association of undertakings.
86. The notion of undertaking is not defined in the EC Treaty. The EC Court of Justice has stated that such notion includes «*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*» (Judgement of 23 April 1991, case C-41/90, *Höfnér*, in *E.C.R.* 1991, I-1979, para. 21). The fact that a given entity is a «non-profit» entity is irrelevant, provided that it does perform some economic activity.
87. As illustrated above, UEFA is a private association exerting regulatory authority in European football and organizing pan-European competitions. A good part of UEFA's activities is of a purely sporting nature, particularly when it adopts measures as a mere regulator of sporting matters. However, UEFA also carries out activities of an economic nature, *e.g.* with regard to advertising contracts and to contracts relating to television broadcasting rights (*see* EC Commission decision of 27 October 1992, *1990 World Cup*, in *Official Journal EC*, 12 November 1992, L 326/31, para. 47). Therefore, with respect to the economic activities in which it is involved, UEFA can be characterized as an undertaking within the meaning of EC competition law, as construed by the Court of Justice. The fifty-one national federations affiliated to UEFA also carry out economic activities at national level, notably by exploiting their logos, managing their national teams and selling television rights; with respect to those activities, they are also undertakings within the meaning of EC competition law. Therefore, the Panel holds that UEFA, with respect to the economic

activities in which it is engaged and in which national federations are engaged, is at the same time an undertaking and an association of undertakings.

88. The Panel wonders whether UEFA should also be regarded, as argued by the Claimants, as an «association of associations of undertakings» – within the meaning of the EC Commission decisions of 15 December 1982, *BNIC*, and of 7 December 1984, *Milchförderungsfonds*, in which Article 81.1 (*ex* 85.1) was applied to resolutions issued by trade associations having as their members other trade associations –, that is whether UEFA should be regarded not only as an association of (so to say) «federation undertakings» but also, through the federations, as an association of «club undertakings». In fact, if UEFA was found not to be an association of «club undertakings», its resolutions concerning the way club competitions are organized could not be considered as instruments of horizontal coordination of the clubs' competitive behaviour and would not be caught by Article 81.1 (*ex* 85.1) of the EC Treaty. In other words, with respect to UEFA rules which govern club competitions – *e.g.* establishing conditions of participation, disqualifying clubs or players from the competition, setting forth players' transfer rules, designating referees, fixing schedules, and the like – UEFA could be considered merely as a regulator above the clubs rather than a sort of clubs' trade association; accordingly, the Contested Rule would not be considered as the product of a horizontal collusion between the clubs and would not be caught by Article 81.1 (*ex* 85.1).
89. In order to ascertain whether UEFA should be regarded as an association of associations of undertakings or not, it is necessary to assess whether national football federations affiliated to UEFA are to be considered as associations of undertakings or not. There is no doubt that professional football clubs engage in economic activities and, consequently, are undertakings. In particular, they engage in economic activities such as the sale of entrance tickets for home matches, the sale of broadcasting rights, the exploitation of logos and the conclusion of sponsorship and advertising contracts. Numerous minor clubs, which are formally non-profit making, also engage in some of those economic activities – although on a much lower scale – and are also to be regarded as undertakings (for example, clubs taking part in championships pertaining to the third or fourth national divisions). In all national federations, there is also a very large number of truly amateur clubs (including youth clubs), which are run by unpaid volunteers, perform purely sporting activities and do not engage in any economic activity (the EC Commission has recently defined such clubs as «grassroots clubs» in the already quoted document *The European model of sport*, Brussels, 1999). Accordingly, these grassroots clubs should not be regarded as undertakings (*see* Judgement of 17 December 1993, joined cases C-159/91 and C-160/91, para. 18, where the Court of Justice held that an entity fulfilling a social function and entirely non-profit making does not perform an economic activity and thus is not an undertaking within the meaning of *ex* Article 85). The line between non-amateur clubs (which are undertakings) and amateur or grassroots clubs (which are not) should obviously be drawn at different levels from country to country, depending on the national economic development of football. What is common within all fifty-one European federations is the circumstance that the number of amateur or grassroots clubs is largely preponderant over that of non-amateur clubs.

90. Advocate General Lenz stated in his *Bosman* opinion that national football federations «are to be regarded as associations of undertakings within the meaning of Article 85. The fact that in addition to the professional clubs, a large number of amateur clubs also belong to those associations makes no difference» (Opinion delivered on 20 September 1995, case C-415/93, *Bosman*, in *E.C.R.* 1995, I-4921, para. 256).

Therefore, according to the argument of Advocate General Lenz, UEFA is an association of associations of undertakings, acting as a instrument of professional clubs' cooperation. Advocate General Lenz did not provide any further discussion on this issue. As is well known, in the *Bosman* case the Court of Justice declined to rule on competition law issues (Judgement of 15 December 1995, *ibidem*, para. 138), and the previous sports cases decided by the Court did not involve competition rules either (Judgement of 12 December 1974, case 36/74, *Walrave*, in *E.C.R.* 1974, 1405; Judgement of 14 July 1976, case 13/76, *Donà*, in *E.C.R.* 1976, 1333; Judgement of 15 October 1987, 222/86, *Heylens*, in *E.C.R.* 1987, 4097). Therefore, no specific guidance can be found on this question in the European Court jurisprudence related to sport.

91. The Panel is not entirely persuaded by the assertion of Advocate General Lenz that it «makes no difference» that national federations encompass a large number of amateur or grassroots clubs. In fact, the amateur or grassroots clubs, truly not engaged in economic activities, may condition the will and the acts of national federations more than professional and semi-professional clubs. Due to the democratic voting and electoral systems prevailing within national federations, the majority of votes tend to be controlled by amateur or grassroots clubs, and federations' executive organs – the President and the Board – often tend to be the expression of such majority. In some national federations even athletes and coaches have some electoral standing. This deficit of representativeness *vis-à-vis* professional clubs is the main reason why such clubs have created national «leagues» as their own truly representative bodies and why there are often conflicts between leagues and federations (*see supra*, paras. 17-18). Through the leagues, which are their true trade associations, professional clubs tend to manage their championships by themselves, retaining all the related revenues (television rights, advertising, *etc.*), and in several countries have progressively acquired a noticeable degree of autonomy from federations (*e.g.* the Premier League in England or the «Lega Nazionale Professionisti» in Italy).
92. In other words, the executives of national federations formally represent *all* the clubs of their respective countries but their constituency is mostly composed of amateur or grassroots clubs. Also within UEFA, representatives of national federations should be regarded less as delegates of the clubs engaged in economic activities than as delegates of amateur or grassroots clubs. It should also be mentioned that federation posts are honorary, and individuals elected to such posts are not bound by instructions or orders coming from the electors. Obviously, professional clubs have their ways of influencing federations and federation executives much more than their mere electoral weight would suggest, but it would still seem inaccurate *sic et simpliciter* to regard national federations as associations of undertakings and, automatically, national federations' regulations as decisions by associations of undertakings within the meaning of Article 81.1. It should not be overlooked

that decisions by associations of undertakings are caught by Article 81.1 in order to prevent circumvention of the prohibition of restrictive agreements and concerted practices. Decisions by associations of undertakings are typically a medium for the coordination and cooperation of undertakings of a given sector. The Panel observes that national leagues (where they exist) rather than federations currently seem to be the actual medium for the coordination of professional clubs. Therefore, national leagues seem to be the true associations of «club undertakings», league executives seem to be the true delegates of such undertakings, and the acts and conduct of leagues seem to truly reflect the will of such undertakings. National leagues are not direct members of UEFA and, as mentioned (*supra*, para. 19), the most important of them have recently constituted their own independent association in order to have their interests truly represented at pan-European level.

93. The Panel notes that in the *BNIC/Clair* case, the Court of Justice held that BNIC – the French cognac industry board – was in fact an association of undertakings because its measures were negotiated and adopted by individuals who were (formally appointed by the competent Minister but in fact) designated by the undertakings or associations of undertakings concerned and had to be considered as their representatives (Judgment of 30 January 1985, case 123/83, *BNIC/Clair*, in *E.C.R.* 1985, 391, para. 19). In *Reiff*, the Court of Justice held that the individuals composing a German tariff commission for road freight, appointed by the Minister upon the proposal of the undertakings or associations of undertakings of the interested sector, could not be deemed as representatives of the industry because they were not bound by instructions or orders coming from those undertakings or associations; therefore, the Court concluded that the tariff commission was not an association of undertakings and that its decisions were not caught by Article 85 (now 81) of the EC Treaty (Judgment of 17 November 1993, case C-185/91, *Reiff*, in *E.C.R.* 1993, I-5801, para. 19).

94. In the light of this case law and in the light of the circumstances described above (*supra*, paras. 91-92), the Panel is quite doubtful as to whether UEFA can be truly characterized as an association of associations of undertakings and as to whether members of the UEFA Executive Committee or of the UEFA Congress can be seen as actually representing the «club undertakings». At the very least, before reaching any such conclusions, it would be necessary to examine in detail the process leading to the appointment or election of individuals to national federation posts and to the various UEFA bodies, to look into the links of those individuals with professional clubs, and to investigate case by case whether a UEFA measure is in fact the expression of an agreement by or with the professional clubs or whether it strengthens already existing agreements between these clubs. Neither the Claimants nor the Respondent have supplied any evidence which could help the Panel in any such analysis. Therefore, the Panel must content itself with the stated conclusion (*supra*, para. 87) that UEFA, with respect to the economic activities in which it is involved and in which national federations are involved, is surely an undertaking and an association of «federation undertakings», leaving the question open as to whether UEFA is also an association of «club undertakings» through which clubs coordinate their economic behaviour. In any event, despite underlying doubts on this issue, given that UEFA essentially advanced no arguments to counter the Claimants' assertion that UEFA is an

association of associations of undertakings, the Panel will assume for the purposes of the ensuing discussion of competition law that UEFA is in fact an association of «club undertakings» whose decisions and rules concerning club competitions constitute a medium of horizontal cooperation between the competing clubs (as asserted by Advocate General Lenz in his *Bosman* opinion; see *supra*, para. 90). As a result, in order to proceed with its analysis, the Panel assumes that the Contested Rule is a decision by an association of associations of undertakings and, as such, falls within the scope of Article 81.1 (*ex* 85.1).

e) Market definition

95. The Panel notes that, in order to examine whether the Contested Rule has the object or the effect of appreciably restricting competition (Article 81) or constitutes an abuse of dominant position (Article 82), it is necessary to identify and define the relevant market in both its product and geographic dimensions.
96. As to *product market* definition, the Panel observes that, according to EC law and practice, essentially «*a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*» (EC Commission Notice «on the definition of relevant market for the purposes of Community competition law», in *Official Journal EC*, 9 December 1997, C 372/5, para. 7).
97. The Claimants, referring to the economic report prepared by Mr. Boon upon their request, allege that the relevant product market is a «European football market». According to the Claimants, such market would comprise the supply of all football matches played in Europe and a variety of related «ancillary football services markets», such as the market for capital investment in football clubs, the players market, the media rights market, the sponsorship and advertising market and the merchandising market. In his written report, Mr. Boon includes within the boundaries of this general «European football market» all UEFA «matches played out before a paying public across Europe and in the wider world». At the hearing, the Panel asked Mr. Boon to better identify the product, the demand side (the consumers) and the supply side (the suppliers) in the alleged «European football market». Mr. Boon answered that the product is constituted by all matches played in UEFA club competitions, the consumers are all the football fans and supporters, and the suppliers are the clubs and the players together. The notion that clubs and players supply matches together on the market is clearly unfounded in terms of competition law (and inconsistent with Mr. Boon's several references in his report to a players' market where clubs are on the demand side and players on the supply side), and the Panel can thus discard it immediately without further discussion.
98. The Panel finds that the Claimants' definition of the product market is not a viable one in terms of competition law. The notion of a general European football market is too ample, and the other related markets are too heterogeneous to be included therein. Given that the definition of a market should be determined primarily by interchangeability (or

substitutability) from the consumers' viewpoint, it is implausible to regard all European football matches as interchangeable. Certainly, in terms of stadium attendance most of the matches are not interchangeable because of geographic constraints and of consumer preferences, notably constituted by the supporters' allegiance to a given team. Indeed, virtually every club playing in a UEFA competition can be deemed to hold a sort of «captive market» with regard to live attendance of its home matches. Even in terms of television audience, a UEFA Cup or Champions' League match between a Swiss and a German team would hardly be considered by British viewers as a substitute – possibly with the only exception of the final match of the competition or some other unusual circumstances (*e.g.* the presence of several renowned British players in the match), and even in such cases it would be a poor substitute – for a match involving a British team (*see* Monopolies and Mergers Commission, *British Sky Broadcasting Group plc and Manchester United plc. A report on the proposed merger*, London, 12 March 1999, hereinafter «MMC Report», paras. 2.16-2.24). Furthermore, if the products of the European football market are the European matches, most of the various other markets mentioned by the Claimants are certainly related in some way or another to the supply of such football matches, but they cannot be «comprised» within that market. A few examples suffice: the sale of merchandise can and does take place regardless of European matches; contracts for advertising on panels within a given stadium can be concluded regardless of any connection with football matches (*e.g.* in view of a series of rock concerts or of non-football sporting events) or regardless of any connection with *European* football matches; some of the mentioned products or services are not offered to the final consumers (in particular sponsorship contracts, free-to-air broadcasting rights and capital investment in clubs not listed on the stock exchange).

99. The Panel observes that in fact there appears to be no single «European football market» comprising various ancillary markets. Rather, there are several «football markets» in which professional football clubs operate, such as those referred to by the Claimants, but they are all separate markets for the purposes of competition law. Support for such proposition can be found in the already quoted recent report by the British Monopolies and Mergers Commission (now transformed into the Competition Commission) concerning the proposed acquisition of the football club Manchester United by the broadcasting company BskyB, where it is evidenced how Manchester United operates in several separate markets such as the supply of football matches, television rights to football matches, advertising and sponsorship, retailing of merchandise, and various services such as catering and hospitality associated with its stadium (MMC Report, para. 2.16).

100. Most of such football markets are clearly segmented in both their product and geographic dimensions. With regard to the television broadcasting market, there appears to be a growing consensus among competition authorities that pay (including pay-per-view) television and free-to-air television are separate product markets (*see* MMC Report, paras. 2.36 and 2.39; Office of Fair Trading, *The Director General's review of BskyB's position in the wholesale pay TV market*, London, December 1996, paras. 2.3 and 2.6; «Autorità garante della concorrenza e del mercato», that is the Italian competition authority, Decision no. 6999 of 26 March 1999, *Stream/Telepiù*, in *Bollettino* 12/1999, para. 9). Also from the geographic point of view, although sports broadcasting is becoming more and more international and cross-

border, competition authorities and courts throughout Europe tend to maintain that broadcasting markets are mostly national, even if some of the broadcasting companies are multi-national and some of the events are covered worldwide (*see e.g.* the Decision of 11 December 1997 by the «*Bundesgerichtshof*», that is the highest German court in civil matters, upholding the previous decisions of the German competition authority «*Bundeskartellamt*» and of the appellate court «*Kammergericht*» in a case concerning television rights to European matches). As mentioned (*supra*, para. 98), another example of extreme geographic segmentation is to be found in the market for gate revenues (including both season tickets and match tickets). The sale of a club's merchandise tends also to be geographically very defined, with the only possible exception of a few top European clubs.

101. Having found that separate football markets exist, rather than a single and comprehensive European football market, the Panel must establish the relevant product market within which to assess whether the Contested Rule restricts competition or not. It is undisputed that the Claimants' basic grievance in this case concerns UEFA's interference with their wish to keep owning (and even further acquiring) various football clubs capable of competing in UEFA competitions. Indeed, the Claimants repeatedly stressed in their written and oral submissions that the Contested Rule would restrict investments in European football clubs' stocks. Accordingly, the Panel finds that the market more directly related to, and potentially affected by, the Contested Rule appears to be a market which can be defined as the «*market for ownership interests in football clubs capable of taking part in UEFA competitions*». A market for ownership interests in professional clubs has been identified as the relevant market in some United States antitrust cases, particularly in cases related to league rules banning cross-ownership of clubs of other professional sports leagues or subjecting to authorization the sale of a club. *See e.g. NASL v. NFL*, 505 F.Supp. 659 (S.D.N.Y. 1980), *reversed* 670 F.2d 1249 (2d Cir. 1982); *Sullivan v. NFL*, 34 F.3d 91 (1st Cir. 1994); *Piazza v. MLB*, 831 F.Supp. 420 (1993). The Panel finds also, in the light of the content of the Contested Rule and on the basis of the available evidence, that the Contested Rule appears to be only indirectly related, if at all, to the various other markets suggested by the Claimants, such as the market for players, the sponsorship market, the merchandising market, the media rights market and the market for gate revenues. Therefore, the effects on these markets will be considered only on a subsidiary basis to the said principal relevant market, concerning ownership interests in European professional football clubs.

102. The Panel considers that the relevant market, as defined, would include on the supply side – that is, the potential sellers of ownership interests – all the owners of European football clubs which can potentially qualify for a UEFA competition. Mr. Boon has illustrated how an investment in clubs which can qualify for UEFA competitions (referring to the main UEFA competitions, the Champions' League and the UEFA Cup) is much more attractive than an investment in other football clubs because «*from a financial perspective, access to European club competition is disproportionately important to club success*». Therefore, according to this economic analysis, clubs which cannot hope to qualify for one of the main UEFA competitions should not be viewed as substitutes by investors interested in football clubs. In principle, only clubs competing in the top division of one of the fifty-one European national federations can hope to qualify (the only exception being the rare occurrence of a club from

a lower division winning the national cup). According to the Boon report, there are currently 737 clubs playing in the top divisions of the fifty-one UEFA countries. While the number of such clubs is basically the same every year, their identity varies slightly every football season because of the promotion/relegation system which has already been described (*see supra*, para. 18). Of those 737 clubs, however, probably less than a half – perhaps 350 clubs – have a realistic chance of qualifying for one of the two main UEFA competitions, given that less than 200 slots are available. It should also be considered that the number of clubs having a realistic chance of passing the first rounds is even smaller: as reported by Mr. Boon, over the five year period 1993/94-1997/98 only 66 clubs have achieved a place in the quarter final of one of the three main UEFA competitions.

103. The Panel observes that, because of the peculiarities of the football sector, investment in football clubs does not appear to be interchangeable with investments in other businesses, or even in other leisure businesses. The publicity and notoriety given by the ownership of a football club, besides the inherent excitement and gratification of running such a popular and emotional business, have always rendered such activity particularly attractive in terms of so-called VIP status and of high profile relationships with politicians and local communities. Indeed, ownership of a football club has often proved to be quite helpful, and sometimes expedient, to other business or political activities. Nowadays, because of the enormous increase in the amounts paid to clubs for television broadcasting rights, the profitability of professional clubs is also becoming interesting (*see MMC Report*, para. 3.79 *et seq.*). In particular, ownership of European professional football clubs appears to be an attractive strategic fit for media groups, given that football is a key media asset with further growth potential (*see MMC Report*, paras. 2.136-2.139 and 3.103). In economic terms, the circumstance that club ownership involves significant additional aspects to the mere profitability of a club means that the individual or corporate owner places on its club a significant instrumental and consumption value in addition to its possible investment value. This is not to be found in other business activities, which, therefore, are not interchangeable with the ownership of a football club. Moreover, given the largely leading position of football in European sports, clubs of other sports (*e.g.* a professional basketball club) can be deemed as potential substitutes only in few and very defined locations where such other sports enjoy popular success. Looking at Europe as a whole, other sports do not appear to offer a suitable alternative to the acquisition and ownership of football clubs.

104. In the light of the above, on the demand side (that is, the potential buyers of ownership interests) the market would include any individual or corporation potentially interested in an investment opportunity in a football club which could qualify for a UEFA competition. In this respect, the Claimants assert that availability of capital for investment in clubs is limited, that multi-club ownership is a rational economic investment strategy and, thus, multi-club owners are a key source of capital for football clubs within UEFA's jurisdiction. The Panel finds this argument unconvincing. As has already been said, ownership of football clubs has always been particularly attractive for reasons that go beyond mere economic considerations. Changes in clubs' ownership are notoriously quite common, and the Claimants have provided no substantial evidence proving that owners willing to sell a club of UEFA level encounter particular problems in finding suitable buyers. In fact, there is

even some empirical evidence that in some markets football clubs have been able to attract substantial capital investment from new sources, not from the historic owners of the clubs, despite the presence of a rule somewhat analogous to, or even stricter than, the Contested Rule (*see infra*, para. 120).

105. The Panel remarks that the possible profitability of a football club and its attractiveness to investors depends much more on its specific characteristics, particularly its location and its «brand», than on the identity of the potential buyers. The Boon report mentions that multi-club owners enjoy economies of scale and synergies such as sharing of information and expertise, single sourcing of supplies and centralized services. However, the extent to which football clubs located in different countries could share resources appears to be quite limited, particularly if clubs must be kept isolated from each other for sporting reasons as ENIC affirms it is doing (*see supra*, para. 32). Moreover, most of such economies of scale – such as headquarters costs, in-house expertise and common purchase of services of various kinds (*e.g.* computer consultancy) – would also be available to clubs belonging (as most often is the case) to entrepreneurs or groups involved in other non-football businesses. As to media rights, given the current negative attitude of most competition authorities and judges throughout Europe concerning the collective sale of television broadcasting rights (*see e.g.* the notorious Decision of 11 December 1997 by the *Bundesgerichtshof*, *supra* at para. 100), multi-club owners would conceivably be barred from collectively selling the rights to their clubs' matches and, therefore, no economies of scale could be enjoyed in this area. In any event, given the said separation of national television markets (*supra*, para. 100), the joint sale of broadcasting rights to matches of clubs located in different countries would appear not to afford a particular negotiating advantage.
106. The Panel observes that several of the benefits mentioned by the Claimants, which clubs allegedly attain when they are controlled by multi-club owners are, in fact, benefits that any clubs would derive from qualified and efficient management, regardless of the ownership structure. In this respect, the Panel is impressed by the improvements allegedly brought by ENIC to the management of its clubs, but it is not prepared to accept the proposition that multi-club owners are better owners than single club owners. In the Panel's view, it is changes in management rather than in ownership that affect the way football clubs are run. Moreover, the Panel remarks that, given the cost structure of football clubs, the savings due to the supposed economies of scale would be negligible compared to the current costs for players' (or even coaches') remuneration (*see supra*, paras. 32-33). In other terms, economies of scale do not yield what mostly matters in order to keep clubs successful on and off the field: good players and coaches. An instance of this can be given by the sporting results of the Italian club Vicenza; notwithstanding the supposed economies of scale and efficient management related to its being controlled by ENIC, at the end of the 1998/99 season Vicenza has been relegated to the Italian second division. Furthermore, the Panel finds the Claimants' argument (that there is a scarcity of potential buyers of clubs) particularly unconvincing in the light of the circumstance that the price for obtaining control of a club able to qualify for UEFA competitions – although not one of the top European clubs – appears to be affordable by a large number of corporate or individual entrepreneurs. For instance, in order to obtain control of the Claimants – clubs at the top of their countries and

able to achieve the quarter final of a UEFA competition – ENIC paid approximately £ 2.5 million for AEK and £ 2.2 million for Slavia, which are prices comparable to those of rather small enterprises in various European business sectors. As a result, the Panel concludes that there are countless potential buyers of ownership interests in football clubs which could qualify for a UEFA competition.

107. As to *geographic market* definition, the Panel observes that, according to EC law and practice, essentially «*a relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*» (EC Commission Notice «on the definition of relevant market for the purposes of Community competition law», in *Official Journal EC*, 9 December 1997, C 372/5, para. 8).
108. The evidence provided by the Claimants shows how the geographic dimension of the market for ownership interests in football clubs potentially taking part in UEFA competition is pan-European. There are no impediments for clubs in attracting potential investors from all over Europe and, conversely, almost no obstacles for a potential investor in buying an ownership interest in any given club around Europe. The actual investments by ENIC confirm this pan-European dimension. Therefore, the Panel concludes that the relevant geographic market extends to Europe as a whole, or more precisely to the territories of the fifty-one European federations affiliated to UEFA (which in reality, for historical reasons, encompasses federations that do not correspond to States, such as Scotland or Wales, and goes beyond geographical Europe, insofar as it includes Israel). As mentioned, other football markets tend to be geographically more segmented (*see supra*, para. 99).
- f) Compatibility with Article 81 (*ex 85*) of the EC Treaty
109. For an agreement between undertakings or a decision by an association of undertakings to be caught by Article 81.1, it must have the «object or effect» of restricting competition (as is customary in EC case law and practice, reference is here made only to «restriction» of competition as the general term encompassing also prevention and distortion). Since the «object» and the «effect» are not cumulative but alternative requirements, as suggested by the conjunction «or» (*see* Court of Justice, Judgement of 30 June 1966, case 56/65, *Société Technique Minière*, in *E.C.R.* 1966, 235, at 249), the Panel needs first to consider the *object* of the Contested Rule, *i.e.* its purpose in the context in which it is to be applied. Then, if the purpose of the Contested Rule does not appear to be anti-competitive, the Panel needs to take into consideration its actual *effect* on the relevant market. Should the Contested Rule have either the object or the effect of hindering competition, the Panel would then be required by EC case law to assess the Contested Rule in its economic context in order to decide whether it affects competition and trade between Member States to an *appreciable* extent (*see e.g.* Court of Justice, Judgement of 9 July 1969, case 5/69, *Völk*, in *E.C.R.* 1969,

295, para. 3; Judgement of 8 February 1971, case 22/71, *Béguelin*, in *E.C.R.* 1971, 949, para. 16).

110. As to the *object* of the Contested Rule, the Claimants assert that UEFA's predominant purpose has been to preserve its monopoly control over European football competitions rather than to preserve the integrity of the game. The Claimants' argue that support for this assertion can be found in the UEFA internal memorandum of 25 February 1998, drafted by Mr. Marcel Benz after the meeting with ENIC representatives of the previous day, and in the rules of the UEFA Statutes providing for the monopoly power of UEFA over European competitions. In the UEFA internal memorandum, under the heading «possible problems, questions and risks», it is possible to read *inter alia*:

«Does the ENIC group form the basis for a European league ... Couldn't a media mogul take advantage of ENIC's groundwork and create a European league with the ENIC clubs? Couldn't other investors (e.g. IMG) pursue the same strategy and buy up clubs on a large scale? ... Isn't it a risk for UEFA in the media sector if TV stations own the rights of clubs in the domestic competition? Won't central marketing by UEFA be infringed upon sooner or later? The search for UEFA Champions League sponsors could also become harder, as sponsors would also get a similar market presence throughout Europe with ENIC».

111. The Respondent replies by asserting that, besides the endeavour to prevent a clear conflict of interest situation and thus to ensure that competition is genuine, there was no ulterior motive for the adoption of the Contested Rule. The Respondent finds support in the same UEFA internal memorandum of 25 February 1999, where questions are raised on *«how UEFA could guarantee sporting competition if two clubs of the ENIC group met in the same UEFA competition. Who would win? Would ENIC or its management decide, or would the winners be decided on the pitch, in a purely sporting encounter, as desired by UEFA and its public? ... UEFA must take all legal measures possible to guarantee clean competition. ... The interests of clean competition in sport are at stake».*

112. The Panel notes that both the title and the text of the Contested Rule appear *prima facie* to support the Respondent's assertion that the Contested Rule is only designed to ensure that competition is genuine. The title reads «Integrity of the UEFA Club Competitions: Independence of the Clubs», while Paragraph A declares the object of the Contested Rule as follows:

«It is of fundamental importance that the sporting integrity of the UEFA club competitions be protected. To achieve this aim, UEFA reserves the right to intervene and to take appropriate action in any situation in which it transpires that the same individual or legal entity is in a position to influence the management, administration and/or sporting performance of more than one team participating in the same UEFA club competition».

Moreover, the Panel points out that the Contested Rule is not limited to banning multi-club ownership within the same competition but also forbids any other type of structure or behaviour which could potentially enable a club (or a related person) to influence a competitor in the same competition (*see* Paragraphs B.1 and B.2 of the Contested Rule).

113. The Panel considers that the Claimants had the burden of rebutting such *prima facie* evidence by proving that the true object of the Contested Rule was an anti-competitive one. The

Panel finds that the Claimants have not satisfied this burden of proof, given that the only plausible evidence relied upon is the UEFA internal memorandum of 25 February 1998, which is at best ambiguous. Apart from the fact that it was drafted by an individual who is not a member of the body which adopted the rule, the memorandum appears to contain meeting notes rather than statements of policy and questions rather than answers. As a matter of fact, the memorandum lends support to contradictory arguments; therefore, it is of little avail for the rebuttal of the said *prima facie* evidence. As to the provisions of the UEFA Statutes mentioned by the Claimants, they simply confirm the notorious circumstance that UEFA is the institutional and regulatory authority over European football, as normally happens with all international sports federations: in no way do such provisions prove or disprove a particular object of the Contested Rule. The Panel finds, therefore, that in enacting the Contested Rule UEFA did purport to prevent the conflict of interest inherent in commonly owned clubs taking part in the same competition and to ensure a genuine athletic event with truly uncertain results. As a result, the Panel holds that the object of the Contested Rule is not to restrict competition within the meaning of Article 81.1 of the EC Treaty.

114. As to the *effect* of the Contested Rule, the Claimants assert that it appreciably restricts competition by preventing or restricting investment by multiple owners in European clubs, by changing the nature, intensity and pattern of competition between commonly controlled clubs and those having other ownership structures, and by enhancing the economic imbalance between football clubs leading to an increase in the market dominance of a few clubs over the majority of smaller and medium-sized clubs. On the other hand, the Respondent asserts that the Contested Rule has an overwhelmingly pro-competitive purpose and effect, namely to preserve the integrity of sporting competition between football clubs.
115. According to EC case law, in order to ascertain whether competition is in fact restricted to an appreciable extent, the Panel must essentially look at the competition which would occur on the relevant market *in the absence* of the Contested Rule (*see* Court of Justice, Judgement of 30 June 1966, case 56/65, *Société Technique Minière*, in E.C.R. 1966, 235, at 250; Judgement of 11 July 1985, case 42/84, *Remia*, in E.C.R. 1985, 2545, para. 18).
116. The Panel observes that the Contested Rule undoubtedly discourages to some extent any current owner of a club potentially capable of qualifying for UEFA competitions from buying ownership interests in another club having the same capability. In the absence of the Contested Rule, not only would there not be such discouragement but, according to the Boon report, multi-club control could be expected to expand. Assuming that Mr. Boon's conjecture is correct, single club owners would probably perceive that multi-club owners retain market advantages from their expanded dimension and might decide that the best way to improve their own position would be also to acquire additional clubs. With an expansion of multi-club ownership throughout Europe the total number of club owners, and thus the total number of undertakings on the market, would evidently decrease, even though the number of clubs realistically aspiring to a slot in a UEFA competition would probably remain the same because the number of talented players cannot be increased at will. As

mentioned (*supra*, para. 102), probably no more than 350 clubs can each year realistically aspire to a UEFA slot, of which substantially less than one hundred could realistically hope to pass the first rounds and achieve a satisfactory number of matches and sufficient television exposure. In economic terms, within the relevant market there would be a reduction of the number of actors on the supply side *vis-à-vis* an unvarying large number of actors on the demand side (*see supra*, para 104). In other words, there could be a process of concentration of club ownership into fewer hands, given that there is a sporting barrier to any sudden entry into the market. As is well known, an entry into the market is hindered by the circumstance that in the European sporting system a new club must go through the pyramidal structure of national championships for several years before attaining a top professional level (*see supra*, paras. 15 and 18). As nobody can suddenly create a new football club and apply to directly enter into a top national championship or a UEFA competition (as happens for instance when United States professional leagues expand and add new franchises), a viable entry into the market is possible only through the purchase of an already existing club playing at good level in one of the fifty-one European top divisions.

117. The Panel observes that, from an economic point of view, the said decrease in the number of club owners could be expected either not to have any effect on prices of ownership interests in clubs – because club owners willing to sell their club would still be quite numerous, and because price is determined not only by supply and demand but also by the mentioned instrumental and consumption value placed by owners on clubs (*see supra*, para. 103) – or to bring about an increase in prices once the decrease in owners becomes noticeable. If, stretching the argument to extremes, the said concentration trend led to there being only a few owners of clubs capable of qualifying for UEFA competitions, the market for ownership interests in such clubs would be characterized by an oligopoly – presenting inherent incentives for cartel behaviour – with which any interested buyer would have to deal. Even on other football markets mentioned by the Claimants, where clubs are on the supply side – gate revenues, media rights, merchandising –, the reduction of club owners and the potentially resulting oligopoly could eventually bring about increases in prices to the detriment of consumers (*e.g.* increase in prices of match tickets or of pay television subscriptions). The Panel finds such an oligopoly scenario to be probably too extreme. The fact that when the Contested Rule was enacted the total number of European clubs controlled by multi-club owners was very low – only 12 clubs, according to the Boon report – seems to demonstrate, first, that a rush towards multi-club ownership would be unlikely (at least in the short term) and, second, that the postulated concentration process would in any event need several years to develop. However, even without admitting all the way the oligopoly scenario, it must be acknowledged that in the absence of the Contested Rule the number of undertakings on the market would sooner or later decline while the effects on prices, although scarcely noticeable in the short term, would in due course tend to show an increase.
118. As a result of the foregoing analysis, the Panel finds that, in the absence of the Contested Rule, competition on the relevant market and on other football markets would initially probably remain unaffected and, when affected, it would be restricted. In the light of this *a contrario* test, the Panel finds that the actual effect of the Contested Rule is to place some

limitation on mergers between European high level football clubs, and thus to increase the number of undertakings on the relevant market and on other football markets; accordingly, the Contested Rule preserves or even enhances economic competition between club owners and economic and sporting competition between clubs. The Panel notes that, according to the Court of Justice, clauses restraining competitors' freedom which are indirectly conducive to increasing the number of undertakings on the relevant market must be deemed as pro-competitive (Judgement of 11 July 1985, case 42/84, *Remia*, in *E.C.R.* 1985, 2545, last sentence of para. 19).

119. The Panel observes, consequently, that either the Contested Rule does not affect the relevant market at all or, if it does, it exerts a beneficial influence upon competition, insofar as it tends to prevent a potential increase in prices for ownership interests in professional football clubs (and to prevent potential price increases in other football markets as well), and thus it tends to encourage investment in football clubs. As a result, the Panel finds that the Contested Rule, by discouraging merger and acquisition transactions between existing owners of clubs aspiring to participate in UEFA competitions, and conversely by encouraging investments in such football clubs by the many potential newcomers, appears to have the effect of preserving competition between club owners and between football clubs rather than appreciably restricting competition on the relevant market or on other football markets.
120. Empirical support for the proposition that the Contested Rule not only does not prevent or restrict investment in football clubs, but even favors it, can be found in the British market. There the Premier League has a rule not allowing any person or corporate entity, except with the prior written consent of the Board (which thus far has never been granted), to «*directly or indirectly hold or acquire any interest in more than 10 per cent of the issued share capital of a Club while he or any associate is a director of, or directly or indirectly holds any interest in the share capital of, any other Club*».

Despite a rule substantially stricter than the Contested Rule – 10% rather than a controlling interest – British clubs, as reported by Mr. Boon, have successfully attracted capital investment in recent years and a substantial proportion of such capital investment has been from new corporate investors, not from the historic owners of the clubs.

121. The Claimants also allege that the Contested Rule has the effects of altering the nature, intensity and pattern of competition between commonly controlled clubs and other clubs, and of enhancing the economic imbalance between football clubs, leading to an increase in the market dominance of a few big clubs over the majority of smaller and medium sized clubs. In other words, the Claimants argue that the Contested Rule favours the rich and strong clubs over the weak and poor ones. The Claimants base this argument on the assumption that multi-club owners would tend to own only small and medium clubs and to invest more in countries where football is economically less developed, and thus would mitigate the process of polarization of market power between the bigger clubs in the larger football countries and other clubs. The Claimants' evidence in support of this argument is basically the pattern of ENIC's own investments.

122. The Panel finds that the said assumption is unsupported by meaningful evidence and fails to discern the logic of the argument. Certainly, ENIC has thus far followed the strategy of acquiring medium-sized clubs; however, if such an investment strategy is convenient, nothing will prevent owners of big clubs from acquiring medium-sized clubs as well. As mentioned, it appears to be a reasonable strategy to control clubs of different sporting levels, and some big clubs are indeed doing it: Mr. Boon has mentioned the well known media magnate group controlling AC Milan which also owns Monza (a smaller Italian club not playing in the top Italian division) and Mr. Trijbits has testified with regard to the attitude of top Dutch clubs (*see supra*, para. 35). Therefore, in the absence of the Contested Rule, not only would the polarization of market power between bigger and smaller clubs continue but, in the light of the previous findings, it would probably even be enhanced. After all, polarization of market power is what usually happens in any business sector when mergers and acquisitions are completely left to market dynamics and dominant companies are free to acquire smaller competitors (which is why regulators enact rules such as the EC Merger Regulation no. 4064/89). Moreover, the problem with this scenario is that, while in other types of business it is economically desirable for consumers that marginal and less efficient undertakings disappear from the market, in the sports business consumer welfare requires that numerous clubs remain on the market and achieve the highest possible economic and sporting balance between them. The Panel is of the view that to provide incentives for actual or potential club owners to invest their resources in only one high level club, as the Contested Rule tends to do, is conducive to an economic and sporting balance, rather than an imbalance, between football clubs. Therefore, from this point of view as well, the Panel finds the Contested Rule to be beneficial to competition in football markets.
123. Furthermore, in terms of consumer welfare, the quality of the entertainment provided to European football fans – with reference to both live attendance and television audience – does not appear to be appreciably affected by the Contested Rule. The only conceivable effect of the Contested Rule is that a club which has qualified for a UEFA competition would be replaced by the club from the same country which, in the previous season’s national championship, ranked immediately below the excluded club. Obviously, the replaced club would suffer a harm and its committed supporters would resent the replacement, but at the same time the substitute club and its committed supporters would enjoy a benefit exactly corresponding to the injury of the replaced club. The Panel observes in this respect that in principle competition law protects competition and the market as a whole, not individual competitors. Accordingly, in order to establish an injury to consumer welfare – *i.e.* that fans with a general interest in football are harmed – evidence should be provided that the substitute team would be less skilled and entertaining than the excluded one. This has not been proven by the Claimants and, in any event, it appears quite hard to prove, given that the quality and talent of the players and coach of two closely ranked teams are essentially analogous, and given that participation in UEFA competitions occurs one season later, when the coach or several players might have moved elsewhere and, in fact, the substitute team might well be more talented and entertaining than the replaced one. Therefore, the Panel finds that the Contested Rule does not appear to appreciably affect the quality of the sporting product offered to consumers.

- g) Objective necessity of regulating multi-club ownership and proportionality of the Contested Rule
124. The foregoing findings appear to suffice for rejecting the contention that the Contested Rule appreciably restricts competition, and thus appear to suffice for excluding it from the scope of the prohibition set forth by Article 81 (*ex* 85) of the EC Treaty. However, in order to further support those findings, the Panel deems it opportune to verify whether the limitation on multi-club ownership can also be regarded as an essential feature in order to ensure the proper functioning of a professional football competition. In this regard, the Panel notes that the EC Court of Justice has held in several judgements that restraints on competitors' conduct do not amount to restrictions on competition within the meaning of Article 81.1 (*ex* 85.1), provided that such restraints do not exceed what is necessary for the attainment of legitimate aims and remain proportionate to such aims (*see e.g.* Judgement of 11 July 1985, case 161/84, *Remia*, in *E.C.R.* 1985, 2545; Judgement of 28 January 1986, case 161/84, *Pronuptia*, in *E.C.R.* 1986, 353; Judgement of 19 April 1988, case 27/87, *Erauw*, in *E.C.R.* 1988, 1919; Judgement of 15 December 1994, case C-250/92, *DLG*, in *E.C.R.* 1994, I-5641; Judgement of 12 December 1995, case C-399/93, *Oude Luttikhuis*, in *E.C.R.* 1995, I-4515).
125. The Claimants assert that the means employed by UEFA are disproportionate to the objective of protecting the integrity of European football competitions and have submitted for consideration a variety of «less restrictive alternatives». In particular, the Claimants argue that criminal penalties provided by the various State laws, in addition to UEFA disciplinary powers, are sufficient to deal severely with match-fixing in any case where such wrongdoing is proved. In addition, according to the Claimants, a more proportionate approach could include the adoption by UEFA and by all clubs participating in UEFA competitions of a code of ethics, and more particularly of a draft document prepared by ENIC and by the Claimants entitled «Proposed measures to guarantee sporting integrity in European football competition organised by UEFA». The Claimants have also suggested that the Contested Rule could include a clause for a case by case examination of multi-club ownership in order to appraise particular circumstances, and have proposed a «fit and proper» test for every club owner as a condition for participation in UEFA competitions or even as a requirement for the purchase of a club. They have also proposed that UEFA enact rules limiting the number of clubs which the same owner can control, or that an independent trust be established to which control of commonly owned clubs could be transferred for the duration of UEFA competitions. Moreover, in order to avoid problems with bonuses and transfers, inevitably connected with multi-club ownership (*see supra*, paras. 39-40), suggestions were also advanced that UEFA enact schemes, either general or special to commonly owned clubs, limiting bonuses and transfers of players.
126. The Respondent replies by asserting that the Contested Rule corresponds to the minimum degree of regulation necessary to protect the integrity of football competition and is, therefore, fully compatible with the law. The Respondent argues that the Contested Rule does not prohibit multi-club ownership, but simply prevents commonly controlled clubs

from participating in the same UEFA club competition, and that any investor may acquire a shareholding of up to 50% in any two or more European football clubs participating in UEFA competitions without ever being affected by the Contested Rule. In this respect, the Respondent mentions the stricter regulations which may be found in the United Kingdom, such as the rules of the Premier League, the Football League and the Scottish Football Association, or in the United States, such as the rules of the NBA, the NFL, the NHL and the MLB. The Respondent also argues that preventive measures are necessary in order to avoid conflicts of interest, and cites in this respect the principles applicable to lawyers and arbitrators. The Respondent also criticizes the draft regulation submitted by the Claimants for proposing rules which already exist (such as the obligations to play always to win and to field the best available team, and the disciplinary proceedings for anyone suspected of match-fixing), or rules which are impractical and unrealistic to enforce (such as the obligation for any multi-club owner to ensure the autonomy of each club's coaching and playing staff and the limitation of contacts between the clubs in the event that they play against each other, or the obligation to include in any club at least one minority shareholder capable of exercising minority shareholder's rights), or measures hard to assess and which would probably be challenged in court (such as the exclusion from competition of clubs whose owner is not a fit and proper person).

127. The Panel has already analyzed the «integrity question» and has found that, when commonly controlled clubs participate in the same competition, the consumers would reasonably perceive this situation as a conflict of interest potentially affecting the authenticity of results (*supra*, paras. 22-48). Accordingly, the Panel has concluded that multiple ownership of clubs in the context of the same competition is a justified cause for concern by a sports regulator and organizer such as UEFA (*supra*, para. 48). The Panel has also already found that the intention of the Contested Rule is to prevent the conflict of interest inherent in commonly controlled clubs participating in the same UEFA competition and to preserve the genuineness of results (*supra*, para. 113). In this respect, the Panel is persuaded that this is a legitimate goal to pursue, and finds evident support for this proposition in the *Bosman* ruling, where the EC Court stated that the aim «*of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results ... must be accepted as legitimate*» (Judgement of 15 December 1995, case C-415/93, *Bosman*, in *E.C.R.* 1995, I-4921, para. 106).
128. The Panel observes that organizing sports leagues and competitions needs a certain amount of coordination and horizontal restraints between clubs in order to supply the «product» to the consumers. As was remarked by a leading United States antitrust scholar (and later federal judge) «some activities can only be carried out jointly. Perhaps the leading example is league sports» (R.H. BORK, *The antitrust paradox. A policy at war with itself*, 2nd edition, New York 1993, 278). Indeed, each professional club competing in a league or in a competition has an evident interest in combining sporting and economic rivalry with sporting and economic cooperation. In the words of the Supreme Court of the United States, sport is «*an industry in which horizontal restraints on competition are essential if the product is to be available at all. ... What the NCAA and its member institutions market in this case is competition itself – contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such*

matters as the side of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. ... And the integrity of the "product" cannot be preserved except by mutual agreement» (Judgement of 27 June 1984, *NCAA v. Board of Regents of the University of Oklahoma*, in 468 U.S. 85, 101-102).

Advocate General Lenz basically espoused such line of reasoning when he stated that *«the field of professional football is substantially different from other markets in that the clubs are mutually dependent on each other»* and that *«certain restrictions may be necessary to ensure the proper functioning of the sector»* (Opinion delivered on 20 September 1995, case C-415/93, *Bosman*, in *E.C.R.* 1995, I-4921, para. 270).

129. The Panel is of the opinion that among the «myriad of rules» needed in order to organize a football competition, rules bound to protect public confidence in the authenticity of results appear to be of the utmost importance. The need to preserve the reputation and quality of the football product may bring about restraints on individual club owners' freedom. In this respect, the Panel sees an analogy with restraints which the Court of Justice has regarded as inherent in, and thus necessary for, franchising systems (Judgement of 28 January 1986, case 161/84, *Pronuptia*, in *E.C.R.* 1986, 353, para. 15 *et seq.*).

130. Given that the Panel has found that in multi-club ownership situations a problem of conflict of interest objectively exists (*supra*, para. 45), and that this has been found to affect the public perception of the authenticity of results (*supra*, para. 48), the Panel is persuaded that a rule concerning multi-club ownership is objectively necessary in order to provide the consumers with a credible sporting contest. The question is whether the Contested Rule is proportionate to the legitimate objective pursued or whether UEFA should have adopted a less restrictive means to achieve it. With regard to the principle of the «less restrictive alternative», however, the Panel is of the opinion that this does not necessarily mean that it is necessary to test the Contested Rule against any conceivable alternative. Judges should not substitute for legislators, and the former should always allow the latter to retain a certain margin of appreciation. In other words, «the principle of proportionality cannot be applied mechanically» and «the less restrictive alternative test is not an end in itself but simply facilitates the judicial enquiry» (T. TRIDIMAS, *The principle of proportionality in Community law: from the rule of law to market integration*, in *The Irish Jurist* 1996, 83, at 93-94). Such position is supported by some significant Court of Justice case law (*see e.g.* Judgement of 10 May 1995, case C-384/93, *Alpine Investment*, in *E.C.R.* 1995, I-1141, paras. 51-54).

131. With regard to proportionality, the Panel observes that the Contested Rule has been narrowly drawn to proscribe only the participation in the same UEFA competition of commonly controlled clubs and does not prohibit multi-club ownership as such. The Contested Rule does not proscribe the participation of commonly controlled clubs in two different UEFA competitions and does not prevent the acquisition of shares – up to 49% of the voting rights – in a large number of clubs participating in the same competition. As the scope of the Contested Rule is strictly limited to participation in the same UEFA competition, a multi-club owner can control clubs in several countries and obtain a good

return on the investments even if only one of its clubs is allowed to take part in a given UEFA competition. In this respect, the already quoted MMC Report contains some evidence – referred to the British market, but arguably representative of other national markets – suggesting that the top national championship (in England the Premier League) and the national cup (in England the FA Cup) are the football competitions most preferred by consumers and most economically rewarding, because of their unique combination of volume and popularity of matches (MMC Report, para. 2.22). Indeed, in response to a 1996 British survey, 71% of pay-television subscribers who watched football said that the Premier League was very important to them and 68% said the same of the FA Cup; only 50% said the same of UEFA matches involving British clubs (*ibidem*). Moreover, the number of UEFA matches played by a club (even achieving the final) is substantially fewer than the number of national championship and national cup matches. Accordingly, European football clubs still derive most of their revenues from national championship and cup matches; for example, about 75% of Manchester United’s profits come from Premier League matches (*ibidem*, para. 2.125). In the light of the foregoing data and remarks, and of the circumstance that participation in national competitions is not affected at all, the Panel finds that the Contested Rule appears *prima facie* to be limited to its proper objective and not to be disproportionate or unreasonable. This *prima facie* conclusion needs now to be examined in the light of the less restrictive alternative test.

132. Before proceeding with the less restrictive alternative test, the Panel remarks that, as a normative technique, rules which are applied *a priori* differ from rules which are applied *a posteriori*. Rules that are applied *a priori* tend to prevent undesirable *situations* which might prove difficult or useless to deal with afterwards, rather than imposing a penalty on someone guilty of something. On the other hand, rules that are applied *a posteriori* are bound to react to specific *behaviours*. For example, under EC law and several national laws, rules on mergers are applied *a priori*, whereas rules on abuses of dominant position are applied *a posteriori*. Merger operations are checked before they actually take place, and are blocked if the outcome of the merger would be the establishment of a dominant position because of the possible negative consequences on the market and not because the individuals owning or managing the merging undertakings are particularly untrustworthy and the company after the merger is expected to abuse of its dominant position. Among the myriad of possible examples, another obvious example of rules applied *a priori* can be found in provisions of company law restraining cross-ownership of shares (*see* Article 24a of the Second Council Directive of 13 December 1976, no. 77/91/EEC, in *Official Journal EC*, 31 January 1977, L 26/1, as subsequently amended by Council Directive of 23 November 1992, no. 92/101/EEC, in *Official Journal EC*, 28 November 1992, L 347/64). One can think also of all the rules providing for incompatibility between a given position and another (say, between membership of a company’s board of directors and membership of the same company’s board of auditors). All such *a priori* rules are applied on a preventive basis, with no appraisal of any specific wrongdoing and no moral judgement on the individuals or companies concerned. On the other hand, rules setting forth obligations and corresponding penalties or sanctions, such as criminal or disciplinary rules, can be applied only after someone has been found guilty of having violated an obligation. In summary, *a priori* and *a posteriori* rules respond to different legal purposes and are legally complementary rather than

alternative. Therefore, the Panel finds that the Contested Rule, which is clearly to be applied *a priori*, can be supplemented but cannot be substituted by any sporting rules establishing disciplinary sanctions or any State laws forbidding match-fixing. Therefore, such disciplinary and criminal rules cannot be «less restrictive alternatives» insofar as they are not truly «alternative» to the Contested Rule.

133. As to the other alternative means proposed by the Claimants, the Panel is not persuaded that they are viable or that they really can be considered as less restrictive. The Claimants have particularly relied on a draft document headed «*Proposed measures to guarantee sporting integrity in European football competition organised by UEFA*» (hereinafter «the Claimants' Proposal»). According to the Claimants' Proposal, *inter alia*, UEFA would be required in consultation with the relevant national association to control the ownership structure of every club wishing to participate in a UEFA competition and would be «*entitled to take appropriate steps in cases where it considers that a particular individual or legal entity is not a fit and proper person to be or become an owner of a club*», and could «*after giving that person or legal entity a reasonable opportunity to make representations, decide that the club or clubs owned or to be owned by him or it may, subject to giving one season's notice, become ineligible to participate in European competitions*».

At the hearing, the Claimants also proposed to extend this fit and proper test to clubs' directors and executives. Since one season's notice should be granted, the Claimants' Proposal would imply that every summer the UEFA offices should check the ownership structures of all the clubs (established in about fifty different legal systems) which can potentially qualify for the UEFA competitions of the following season – as said, in all the European top national divisions there are 737 clubs, of which perhaps 350 have a realistic chance of qualifying for UEFA competitions (*see supra*, para. 102) – and, after a legal hearing, pass moral judgements on the owners', directors' and executives' adequacy to run a football club. The Panel finds that, from a substantive point of view, it would be very difficult to come up with some objective requirements in order to fairly carry out a fit and proper test and, from a procedural point of view, the administrative costs involved and the legal risks of being sued for economic and moral damages after publicly declaring in front of the whole of Europe that someone is not a fit and proper person are practically incalculable (in this respect, as UEFA is a private body, no comparison can be made with fit and proper tests carried out by public authorities prior to granting bookmaking licences, because such public authorities are essentially immune from being sued for declaring that someone is not «fit and proper»). The Panel notes that the Court of Justice has stated, with reference to the fashion sector, that if it is too difficult to establish objective quality requirements and it is too expensive to control compliance with such requirements, some preventive restraints are acceptable and do not violate Article 81.1 (*ex* 85.1) of the EC Treaty (Judgement of 28 January 1986, case 161/84, *Pronuptia*, in *E.C.R.* 1986, 353, para. 21). Analogously, the Panel finds that the Claimants' Proposal would be very difficult and way too expensive to administer and cannot be regarded as a viable alternative to the Contested Rule. Moreover, hardly could a UEFA rule requiring an inherently intrusive ethical examination of clubs' owners, directors and executives be characterized as a «less restrictive» alternative.

134. The Claimants have also mentioned approvingly some of the rules adopted by national leagues with reference to multi-club ownership – in the United Kingdom: Section J.4.2 of the FA Premier League Rules, Paragraph 84.1 of the Football League Regulations, and Paragraph 13 of the Articles of Association of the Scottish Football Association; in the United States: Article 3 of the NBA Articles of Association, and Article 3, Section 3.11 of the MLB National League Constitution – because they have provision for derogation and for individual cases to be considered on their own merits. The Panel, however, upon reading such rules finds that they are in principle *more* restrictive than the Contested Rule, insofar as they forbid a holding of more than 10% of the shares of another club (the Premier League), or a holding of or dealing in *any* shares or securities of more than one club (Football League, Scottish Football Association), or a holding of *any* financial interest in more than one club (NBA, MLB National League). Admittedly, most of these rules provide for the possibility of trying to obtain the prior approval of the respective sports governing body. However, apart from the fact that in practice no such approval has ever been granted, it seems to the Panel that such possibility for derogation in individual cases is strictly linked to the extremely rigorous rules in force within those leagues. Support for this interpretation can be found in the NBA rules, which clearly distinguish between the mere holding of financial interests, where application for derogation is possible, and *control* of more than one club, which is absolutely forbidden with no provision for derogation. The Panel finds that control of more than one club taking part in the same football competition is so inherently conducive to a conflict of interest, and to the related public suspicions, that there is no scope for the examination of individual cases. In addition, any legal regime based on *ad hoc* authorizations would cause unpredictability and uncertainty, and every denial of authorization would in all likelihood bring about expensive litigation, such as the present one. In this respect, the Panel is of the opinion that, for the good of sports and of consumers, it is advisable that sports leagues and federations try to shape their regulations in such a way that organization and administration of sports are not permanently conditioned by the risk of being sued.
135. The Claimants have then proposed other miscellaneous measures as alternatives to the Contested Rule, but the Panel finds that they are not suitable options. One proposed measure is the enactment of rules limiting the number of clubs that the same owner can control but, as has been seen, even two commonly controlled clubs suffice to give rise to conflict of interest problems. Other proposals try to address the issue by requiring that multi-club owners divest their ownership interests in all but one of the owned clubs solely for the period of the UEFA competition. This would be done through the establishment of an independent trust to which control of commonly owned clubs could be transferred for the duration of UEFA competitions or through the appointment of an independent nominee who would exercise the owner's voting rights in its sole discretion. The Panel finds that this solution would be not only complex to administer but also quite intrusive upon the clubs' structure and management; in any event, the true problem would be that the interim suspension of control or voting rights does not modify the substantial ownership of a club, and thus does not exclude the underlying continuance of a conflict of interest. Lastly, the proposed regulations restricting bonuses and transfers of players in view of a game between two commonly owned clubs would only take care of some aspects of the conflict of interest but, in particular, would not avoid the objective problems related to the allocation of

resources by the multi-club owner among its clubs (*supra*, para. 33 *et seq.*) and to the interest of third clubs (*supra*, para. 43).

136. In conclusion, the Panel finds that the Contested Rule is an essential feature for the organization of a professional football competition and is not more extensive than necessary to serve the fundamental goal of preventing conflicts of interest which would be publicly perceived as affecting the authenticity, and thus the uncertainty, of results in UEFA competitions. The Panel finds the Contested Rule to be proportionate to such legitimate objective and finds that no viable and realistic less restrictive alternatives exist. As a result, also in the light of the previous findings that the Contested Rule does not appear to have the object or effect of restricting competition, the Panel holds that the Contested Rule does not violate Article 81 (*ex 85*) of the EC Treaty.

h) Compatibility with Article 82 (*ex 86*) of the EC Treaty

137. The Claimants assert that UEFA is the only body empowered to organize European competitions and, consequently, holds a dominant position in the various European football markets. According to the Claimants, UEFA enjoys a position of economic strength which enables it to behave to an appreciable extent independently of the other undertakings which operate in the relevant markets, including the football clubs which participate in European competitions, and ultimately independently of supporters and spectators. The Claimants also assert that UEFA and its member associations, which normally enjoy monopoly power in their respective countries, enjoy joint dominance by virtue of their economic and legal links. The Claimants argue that the adoption of the Contested Rule constitutes an abuse of UEFA's dominant position contrary to Article 82 (*ex 86*) of the EC Treaty because the Contested Rule restricts competition, is unnecessary and disproportionate, unfairly discriminates between commonly controlled clubs and other clubs, and is not objectively justified. In order to support their contention that UEFA's conduct amounts to an abuse, the Claimants expressly rely on essentially the same arguments already advanced in connection with Article 81 (*ex 85*) of the EC Treaty.

138. The Respondent replies by denying that UEFA is in a dominant position within the meaning of Article 82 (*ex 86*), and in particular by denying that UEFA is able to behave independently of the clubs. The Respondent remarks that adopting a rule to preserve the integrity of the UEFA club competitions cannot amount to an abuse of a dominant position. The Respondent also asserts that the allegations concerning proportionality, discrimination and anti-competitive behaviour contain nothing new, and thus relies on the arguments advanced with reference to previous grounds.

139. The Panel notes that currently UEFA is the only pan-European regulator and administrator of football in general. However, it is not enough to state that a federation enjoys a monopolistic role in regulating and administering its sport, because this is inherent in the current European sports structure and «is recognized to be the most efficient way of organising sport» (EC Commission, *The European model of sport*, Brussels 1999, para. 3.2; *see*

also CAS 96/166 *K. v. FEI*, preliminary award of 18 November 1997, in *Digest of CAS Awards 1986-1998, op. cit.*, p. 371, para. 38). The Panel observes that in order to establish whether an undertaking has a dominant position, it is necessary to evaluate such dominance not in the abstract but in relation to one or more specific relevant markets. In this respect, UEFA's activities as an undertaking are developed as the sole – thus far – organizer of pan-European football competitions, retaining the related revenues from the sale of television rights for Champions' League matches and for the final match of the UEFA Cup and from the Champions' League group of sponsors. UEFA also cooperates with local undertakings (national federations or other entities) in organizing the final matches of its competitions. Revenues derived from UEFA's organization of pan-European competitions are apportioned among UEFA, including therein member national associations, and the participating clubs. In substance, UEFA can exert a dominant market power in the market for the organization of pan-European football matches and competitions.

140. In order to find an abuse of dominant position, the Panel needs to find that UEFA is seeking to overcome rival competitors through its dominant market power. In this respect, the Panel observes that if UEFA were found to exploit its market power in order, for example, to obstruct the establishment of another entity organizing pan-European football matches, this should certainly be analyzed with particular attention being paid to Article 82 (*ex* 86) of the EC Treaty. A case of this kind was faced by the Italian competition authority, which held that the Italian sailing federation violated Article 3 of the Italian competition statute – essentially identical to Article 82 of the EC Treaty – insofar as it used its dominant position to obstruct and boycott in various ways an independent organizer of sailing regattas with the purpose of profiting more from the organization of its own regattas (*see Autorità garante della concorrenza e del mercato*, Decision no. 788 of 18 November 1992, *AICI/FIV*, in *Bollettino* 22/1992). However, these theoretical and actual examples appear to bear no analogy to the enactment of the Contested Rule. The Claimants are not trying to organize pan-European competitions, nor are they selling television rights to existing pan-European competitions organized in competition with UEFA (as Media Partners would have done if the planned new pan-European football competitions, the Super League and the Pro Cup, had in fact been created outside of UEFA; *see supra*, para. 19).
141. The Panel has already identified the relevant product market as the market for ownership interests in football clubs capable of taking part in UEFA competitions (*see supra*, para. 100). The Panel observes that UEFA does not own any football club, nor can it buy or run one. Accordingly, UEFA is not present at all on this market and cannot be held to enjoy a dominant position. With respect to the relevant market it appears that UEFA may act, and has acted, only as a mere regulator. The Panel also observes that the national federations are not on the relevant market either; therefore, UEFA and its member associations do not enjoy a joint dominant position on such market. The Panel finds that, as a United States court has recognized, «*if a regulation is adopted by an independent sanctioning organization with no financial stake in the outcome, a court will have maximum assurance that the regulation is to protect fair competition within the sport*», (*M&H Tire v. Hoosiers*, 733 F.2d 973, 1st Cir. 1984, at 982-983).

142. The Claimants have pointed out that, according to EC case law, in certain circumstances an undertaking dominant on one market can commit an abuse on a neighbouring market (*see* Court of Justice, Judgement of 6 March 1974, cases 6-7/73, *Commercial Solvents*, in *E.C.R.* 1974, 223; *AKZO*, Judgement of 3 July 1991, case C-62/86, in *E.C.R.* 1994, I-3439; Court of First Instance, Judgement of 1 April 1993, case T-65/89, *British Gypsum*, in *E.C.R.* 1993, II-392; Judgement of 6 October 1994, case T-83/91, *Tetra Pak II*, in *E.C.R.* 1994, II-762).
143. The Panel remarks, however, that in all such EC precedents the dominant undertakings were active on both the market of dominance and the neighbouring non-dominated market. Accordingly, in order to find an abuse of dominant position on a market other than the market of dominance it must be proven that, through the abusive conduct, the dominant undertaking – or the group of dominant undertakings in the event of joint dominance – tends to extend its presence also on the other market or tends to strengthen its dominant position on the market of dominance (or at least tends to undermine the competitors’ competitiveness). In the present case, UEFA (or any national federation) is obviously not going to enter, let alone extend its presence, in the market for ownership interests in football clubs. Furthermore, the Claimants have not provided adequate evidence that UEFA, in adopting the Contested Rule, has tried to strengthen its monopolistic position on the market for the organization of pan-European football matches and competitions (nor have Claimants provided any evidence that there is conduct of this kind attributable to the national federations collectively). Besides such lack of evidence, the Panel fails to see any logical link between the rule on multi-club ownership and the alleged attempt or intent to hinder the entry into the market of a new competitor (which could be the group that has planned to establish a «Super League» or some other entity or individual who might try to create a football league in Europe modelled on United States leagues). The opposite would seem more logical, insofar as the Contested Rule tends to alienate multi-club owners and thus might eventually tend to facilitate their secession from UEFA in order to join alternative pan-European competitions or leagues (*see also supra*, paras. 110-113).
144. In any event, with regard to the various abuses alleged by the Claimants, the Panel observes that it has already dealt with them in connection with other grounds. The Panel has found above that the Contested Rule does not restrict competition (*see supra*, paras. 114-123), that it is necessary and proportionate to the objective pursued (*see supra*, paras. 125-136), that it does not unfairly discriminate between commonly controlled clubs and other clubs (*see supra*, para. 65), and that it is objectively justified (*see supra*, para. 130).
145. In conclusion, the Panel holds that the adoption by UEFA of the Contested Rule has not constituted an abuse of an individual or a collective dominant position within the meaning of Article 82 (*ex* 86) of the EC Treaty.

Swiss competition law: articles 5 and 7 of the Federal Act on Cartels

146. Article 5.1 of the «*Loi fédérale sur les cartels et autres restrictions à la concurrence*» of 6 October 1995 (*i.e.* the Swiss Federal Act on Cartels and Other Restraints of Competition, hereinafter «Swiss Cartel Act») reads as follows:

«Les accords qui affectent de manière notable la concurrence sur le marché de certains biens ou services et qui ne sont pas justifiés par des motifs d'efficacité économique, ainsi que tous ceux qui conduisent à la suppression d'une concurrence efficace, sont illicites» («All agreements which significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency and all agreements that lead to the suppression of effective competition are unlawful»).

It is a provision which essentially corresponds to Article 81 (*ex* 85) of the EC Treaty (*supra*, para. 71).

147. Article 7.1 of the Swiss Cartel Act reads as follows:

«Les pratiques d'entreprises ayant une position dominante sont réputées illicites lorsque celles-ci abusent de leur position et entravent ainsi l'accès d'autres entreprises à la concurrence ou son exercice, ou désavantagent les partenaires commerciaux» («Practices of undertakings having a dominant position are deemed unlawful when such undertakings, through the abuse of their position, prevent other undertakings from entering or competing in the market or when they injure trading partners»).

This provision essentially corresponds to Article 82 (*ex* 86) of the EC Treaty (*supra*, para. 71).

148. With respect to the relevance of the Swiss Cartel Act, the Claimants have remarked that the Contested Rule affects trade within Switzerland in that Swiss football clubs are eligible to compete in, and do compete in, UEFA competitions; moreover, the Swiss club FC Basel is currently controlled by ENIC. The Respondent has not objected to the possible relevance of the Swiss Cartel Act in the present dispute. Both the Claimants and the Respondent have essentially relied on the analysis developed with reference to Article 81 (*ex* 85) and 82 (*ex* 86) of the EC Treaty. The only alleged difference with EC law is that, according to the Claimants, there is no «sporting exception» in Switzerland but only a very narrow exemption (to be interpreted quite rigorously) for the «rules of the game» *vis-à-vis* the «rules of law», which cannot be applied in the present case. The Respondent agrees with the Claimants that the Contested Rule cannot be considered as a «rule of the game» under Swiss law, but contends that Swiss competition law is not more restrictive than EC competition law and, therefore, limitations which are introduced with the sole aim of guaranteeing or enhancing sporting quality of competitions can be justified by a sort of sporting exception.
149. With regard to the «sporting exception», the Panel notes that it has already excluded that it can serve the purpose of exempting the Contested Rule from the application of competition rules (*supra*, para. 83). Consequently, the Panel need not rule on whether such an exception exists under Swiss competition law or not. Furthermore, the Panel observes that, in the light

of the textual similarities and the conceptual correspondence of Swiss competition law to EC competition law, the above findings concerning Articles 81 (*supra*, paras. 109-136) and 82 of the EC Treaty (*supra*, paras. 137-145) are applicable *mutatis mutandis* to Articles 5 and 7 of the Swiss Cartel Act. With particular regard to Article 5, the Panel remarks that the envisaged oligopoly scenario (*supra*, para. 117) is much more likely within a small market such as Switzerland, where there are not many teams aspiring to participate in UEFA competitions; indeed, there are only twelve clubs in the Swiss first division. Therefore, the described pro-competitive effect of the Contested Rule is even amplified within the Swiss market. As a result, the Panel holds that, within the Swiss market, the Contested Rule does not significantly restrict competition within the meaning of Article 5 of the Swiss Cartel Act, nor does it constitute an abuse of dominant position within the meaning of Article 7 of the Swiss Cartel Act.

European community law on the right of establishment and on free movement of capital

150. Article 43 (*ex* 52) of the EC Treaty prohibits «restrictions on the freedom of establishment of nationals of a member State in the territory of another Member State». Under Article 56 (*ex* 73 B) all restrictions on movement of capital and on payments within the Community and between the Member States and third countries are prohibited. Both provisions are directly effective and can therefore be applied by national tribunals or arbitration courts.

151. The Claimants assert that the essence of the Contested Rule is to restrict the possibility of multi-club owners setting up subsidiaries in more than one EC Member State, in violation of Article 43 (*ex* 52) of the EC Treaty. The Claimants also assert that the Contested Rule restricts capital movements within the meaning of Article 56 (*ex* 73 B) of the EC Treaty. The Respondent replies that the Contested Rule, even if caught by such EC provisions, would not infringe them because it is a proportionate means to achieve a legitimate objective.

152. The Panel observes that the Contested Rule does not entail any discrimination based on a person's (or corporation's) nationality; therefore, under EC law jargon, it can be characterized as an «equally applicable measure». As a result, even assuming that the Contested Rule somewhat restricts the right of establishment or the free movement of capital, EC case law envisages the existence of justifications on grounds of reasonableness and public interest, provided that the requirements of necessity and proportionality are met (*see supra*, para. 130).

153. As the Panel has already noted, the Court of Justice has stated that «*in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results ... must be accepted as legitimate*» (Judgement of 15 December 1995, case C-415/93, *Bosman*, in *E.C.R.* 1995, I-4921, para. 106).

Therefore, the aim of the Contested Rule of preserving the authenticity and uncertainty of results – by preventing the conflict of interest inherent in commonly owned clubs participating in the same football competition – is certainly to be considered in principle as a legitimate justification, as long as the aim is pursued through necessary and proportionate means.

154. The Panel has already found that the Contested Rule meets the requirements of objective necessity and of proportionality (*see supra*, paras. 125-136). Consequently, the Panel holds that the Contested Rule does not infringe Article 43 (*ex 52*) and Article 56 (*ex 73 B*) of the EC Treaty.

General principle of law

155. The Claimants assert that it is a general principle of law that a quasi-public body exercising regulatory powers, such as an international federation, must not abuse its powers. The Claimants argue that in adopting the Contested Rule UEFA has abused its powers because it has tried to protect its monopoly power over the organization of pan-European football competitions. The Respondent rejects this allegation.

156. The Panel is of the opinion that all sporting institutions, and in particular all international federations, must abide by general principles of law. Due to the transnational nature of sporting competitions, the effects of the conduct and deeds of international federations are felt in a sporting community throughout various countries. Therefore, the substantive and procedural rules to be respected by international federations cannot be reduced only to its own statutes and regulations and to the laws of the country where the federation is incorporated or of the country where its headquarters are. Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles – a sort of *lex mercatoria* for sports or, so to speak, a *lex ludica* – to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national «public policy» (*«ordre public»*) provision applicable to a given case. Certainly, general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such *lex ludica*. For example, in the CAS award *FIN/FINA* the Panel held that it could intervene in the sanction imposed by the international swimming federation (FINA)

«if the rules adopted by the FINA Bureau are contrary to the general principles of law, if their application is arbitrary, or if the sanctions provided by the rules can be deemed excessive or unfair on their face» (CAS 96/157 *FIN v. FINA*, award of 23 April 1997, in *Digest of CAS Awards 1986-1998, op. cit.*, p. 358, para. 22; *see also* CAS OG 96/006 *M. v. AIBA*, award of 1 August 1996, *ibidem*, p. 415, para. 13).

157. The Panel, on the basis of previous remarks, finds that UEFA did not adopt the Contested Rule with the purpose of protecting its monopoly power over the organization of pan-

European football competitions (*see supra*, paras. 110-113 and 143), and finds that the Contested Rule is not arbitrary nor unreasonable (*see supra*, paras. 48 and 125-136). Therefore, with regard to the substantive content of the Contested Rule, the Panel holds that UEFA did not abuse its regulatory power and did not violate any general principle of law.

158. The Panel observes, however, that under CAS jurisprudence the principle of procedural fairness is surely among the unwritten principles of sports law to be complied with by international federations (*see CAS OG 96/001 US Swimming v. FINA*, award of 22 July 1996, in *Digest of CAS Awards 1986-1998, op. cit.*, p. 381, para. 15; *CAS 96/153 Watt v. ACF*, award of 22 July 1996, *ibidem*, p. 341, para. 10). The Panel has already found that UEFA violated its duty of procedural fairness because it adopted the Contested Rule too late, when the Cup Regulations for the 1998/99 season, containing no restriction for multiple ownership, had already been issued and communicated to the interested football clubs (*see supra*, para. 61). The Panel has also already remarked that such procedural defect by itself does not warrant the permanent annulment of the Contested Rule (*see supra*, para. 62). Therefore, as is going to be seen (*infra*, paras. 159-163), the said lack of procedural fairness will have some consequences only in connection with the temporal effects of this award.

Temporal effects of this award

159. The Panel, approving the CAS interim order of 16 July 1998, has held that UEFA violated its duties of procedural fairness with respect to the 1998/99 season, insofar as it modified the participation requirements for the UEFA Cup at an exceedingly late stage, after such requirements had been publicly announced and the clubs entitled to compete had already been designated (*see supra*, paras. 60-62 and 158). This procedural defect caused the above-mentioned interim suspension of the Contested Rule, freezing the situation as it was before the enactment of the Contested Rule.
160. These proceedings then required more than one whole year to fully develop and come to an end with this award. The interim order appropriately remarked: «*At this preliminary stage, CAS is further of the opinion that the outcome of the Claimants' action is uncertain*» (CAS Procedural Order of 16-17 July 1998, para. 69). The number and complexity of the issues involved and the wide-ranging nature of the dispute have all along given the proceedings a state of uncertainty as to the outcome of the present case. With the release of the present award the CAS ends such state of uncertainty. However, the 1999/2000 football season has already begun and an immediate application of the Contested Rule for this season might involve for some clubs a sudden loss of their eligibility to participate in UEFA competitions (eligibility obtained on the basis of their results in 1998/99 national championships, at a time when the Contested Rule was not in force because of the interim order and there was uncertainty as to the outcome of this case).
161. Moreover, in their written briefs and oral arguments, the Claimants have drawn the Panel's attention to the harmful consequences which might ensue for them and for ENIC from an

award rejecting their petitions. The interim order already stated (*see* CAS Procedural Order of 16-17 July 1998, para. 54) that an adjustment to the Contested Rule should not be arranged hurriedly, and commonly controlled clubs and their owners should have some time to determine their course of action, also taking into account possible legal questions (*e.g.* if shares are to be sold, minority shareholders may be entitled to exercise preemptive rights within given deadlines). There is an obvious need for a reasonable period of time before entry into force, or else the implementation of the Contested Rule may turn out to be excessively detrimental to commonly controlled clubs and their owners.

162. The Panel considers that an immediate application of the effects of the award could be unreasonably harmful to commonly owned clubs which during the recently terminated 1998/99 season have qualified for one of the 1999/2000 UEFA competitions. Such clubs, if any, would find themselves in the same situation as they were in when the CAS rightly stayed the implementation of the Contested Rule. If UEFA had announced in the Summer of 1998 that the Contested Rule was going to be implemented at the beginning of the 1999/2000 football season, no club could have later claimed to have legitimate expectations with respect to the treatment of multi-club ownership. In other words, without a ruling on the temporal effects of this award, the Panel would not give sufficient weight to the procedural defect which occurred in the adoption of the Contested Rule.

163. In conclusion, paramount considerations of fairness and legal certainty, needed in any legal system, militate against allowing UEFA to implement immediately the Contested Rule in the 1999/2000 football season which has already begun. Accordingly, the Panel partially upholds the Claimants' petition to extend the stay of the Contested Rule, and deems it appropriate to extend such stay until the end of the current 1999/2000 football season; for the remaining part, the petition for an indefinite extension of the stay is rejected. As a result, the Panel holds that the Contested Rule can be implemented by UEFA starting from the 2000/2001 football season.

The Court of Arbitration for Sport:

1. Rejects the petitions by AEK Athens and Slavia Prague to declare void or to annul the resolution adopted by UEFA on 19 May 1998 on the «Integrity of the UEFA Club Competitions: Independence of the Clubs».

2. Partially upholding the petition by AEK Athens and Slavia Prague to extend indefinitely the interim stay ordered by the CAS on 16 July 1998, orders the extension of the stay until the end of the 1999/2000 football season and, accordingly, orders UEFA not to deny admission to or exclude clubs from the 1999/2000 UEFA club competitions on the ground that they are under common control; consequently, UEFA is permitted to implement its resolution of 19 May 1998 starting from the 2000/2001 football season.

3. Rejects all other petitions lodged by AEK Athens and Slavia Prague.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 50 117 T 00224 08

In the Matter of an Independent Review Process:

ICM REGISTRY, LLC,

Claimant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES
AND NUMBERS ("ICANN"),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

Judge Stephen M. Schwebel, *Presiding*
Mr. Jan Paulsson
Judge Dickran Tevrizian

February 19, 2010

PART ONE: INTRODUCTION

1. From its beginning in 1965, an exchange over a telephone line between a computer at the Massachusetts Institute of Technology and a computer in California, to the communications colossus that the Internet has become, the Internet has constituted a transformative technology. Its protocols and domain name system standards and software were invented, perfected, and for some 25 years before the formation of the Internet Corporation for Assigned Names and Numbers (ICANN), essentially overseen, by a small group of researchers working under contracts financed by agencies of the Government of the United States of America, most notably by the late Professor Jon Postel of the Information Sciences Institute of the University of Southern California and Dr. Vinton Cerf, founder of the Internet Society. Dr. Cerf, later the distinguished leader of ICANN, played a major role in the early development of the Internet and has continued to do so. European research centers also contributed. From the origin of the Internet domain name system in 1980 until the incorporation of ICANN in 1998, a small community of American computer scientists controlled the management of Internet identifiers. However the utility, reach, influence and exponential growth of the Internet quickly became quintessentially international. In 1998, in recognition of that fact, but at the same time determined to keep that management within the private sector rather than to subject it to the ponderous and politicized processes of international governmental control, the U.S. Department of Commerce, which then contracted on behalf of the U.S. Government with the managers of the Internet, transferred operational responsibility over the protocol and domain names system of the Internet to the newly formed Internet Corporation for Assigned Names and Numbers ("ICANN").

2. ICANN, according to Article 3 of its Articles of Incorporation of November 21, 1998, is a nonprofit public benefit corporation organized under the California Nonprofit Public Benefit Corporation Law "in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization..." ICANN is charged with

"promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of

policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system..." (Claimant's Exhibits, hereafter "C", at C-4.)

ICANN was formed as a California corporation apparently because early proposals for it were prepared at the instance of Professor Postel, who lived and worked in Marina del Rey, California, which became the site of ICANN's headquarters.

3. ICANN, Article 4 of its Articles of Incorporation provides,

"shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

4. ICANN's Bylaws, as amended effective May 29, 2008, in Section 1, define the mission of ICANN as that of coordination of the allocation and assignment

"of the three sets of unique identifiers for the Internet, ...(a) domain names forming a system referred to as "DNS", (b) ...Internet protocol ("IP") addresses and autonomous system ("AS") numbers and (c) Protocol port and parameter numbers". ICANN "coordinates the operation and evolution of the DNS root server system" as well as "policy development reasonably and appropriately related to these technical functions." (C-5.)

5. Section 2 of ICANN's Bylaws provides that, in performing its mission, core values shall apply, among them:

"1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

"2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.

"3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interest of affected parties.

"4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

...

"6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

...

"8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

...

"11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations." (C-5.)

6. The Bylaws provide in Article II that the powers of ICANN shall be exercised and controlled by its Board, whose international composition, representative of various stakeholders, is otherwise detailed in the Bylaws. Article VI, Section 4.1 of the Bylaws provides that "no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director". They specify that "ICANN shall not apply its standards, policies, procedures, or practices inequitably, or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN is to operate in an open and transparent manner "and consistent with procedures designed to ensure fairness" (Article III, Section 1.) In those cases "where the policy action affects public policy concerns," ICANN shall "request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request" (Article III, Section 6).

7. Article IV of the Bylaws, Section 3, provides that: "ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." Any person materially affected by a decision or action of the Board that he or she asserts "is inconsistent" with those Articles and Bylaws may submit a request for independent review which shall be referred to an Independent Review Panel ("IRP"). That Panel "shall be charged with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws". "The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider." The IRP shall have the authority to "declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws" and "recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP". Section 3 further specifies that declarations of the IRP shall be in writing, based solely on the documentation and arguments of the parties, and shall "specifically designate the prevailing party." The Section concludes by providing that, "Where feasible, the Board shall consider the IRP declaration at the Board's next meeting."

8. The international arbitration provider appointed by ICANN is the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association. It appointed the members of the instant Independent Review Panel in September 2008. Thereafter exchanges of written pleadings and extensive exhibits took place, followed by five days of oral hearings in Washington, D.C. September 21-25, 2009.

9. Article XI of ICANN's Bylaws provides, *inter alia*, for a Governmental Advisory Committee ("GAC") to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues". It further provides that the Board shall notify the Chair of the GAC in a timely manner of any proposal raising public policy issues. "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually

acceptable solution." If no such solution can be found, the Board will state in its final decision the reasons why the GAC's advice was not followed.

PART TWO: FACTUAL BACKGROUND OF THE DISPUTE

10. The Domain Name System ("DNS"), a hierarchical name system, is at the heart of the Internet. At its summit is the so-called "root", managed by ICANN, although the U.S. Department of Commerce retains the ultimate capacity of implementing decisions of ICANN to insert new top-level domains into the root. The "root zone file" is the list of top-level domains. Top-level domains ("TLDs"), are identified by readable, comprehensible, "user-friendly" addresses, such as ".com", ".org", and ".net". There are "country-code TLDs" (ccTLDs), two letter codes that identify countries, such as .uk (United Kingdom), .jp (Japan), etc. There are generic TLDs ("gTLDs"), which are subdivided into sponsored TLDs ("sTLDs") and unsponsored TLDs ("gTLDs"). An unsponsored TLD operates under policies established by the global Internet community directly through ICANN, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor is delegated, and carries out, policy-formulation responsibilities over matters concerning the TLD. Thus, under the root, top-level domains are divided into gTLDs such as .com, .net, and .info, and sTLDs such as .aero, .coop, and .museum. And there are ccTLDs, such as .fr (France). Second level domains, under the top-level domains, are legion; e.g., Microsoft.com, dassault.fr. While the global network of computers communicate with one another through a decentralized data routing mechanism, the Internet is centralized in its naming and numbering system. This system matches the unique Internet Protocol address of each computer in the world -- a string of numbers -- with a recognizable domain name. Computers around the world can communicate with one another through the Internet because their Internet Protocol addresses uniquely and reliably correlate with domain names.

11. When ICANN was formed in 1998, there were three generic TLDs: .com, .org, and .net. They were complemented by a few limited-use TLDs, .edu, .gov, .mil, and .int. Since its formation, ICANN has endeavored to introduce new TLDs. In 2000, ICANN opened an application process for the introduction of new gTLDs. This initial round was a preliminary effort to test a "proof of concept" in respect of new gTLDs. ICANN received forty-seven applications for both sponsored and unsponsored TLDs.

12. Among them was an application by the Claimant in these proceedings, ICM Registry (then under another ownership), for an unsponsored .XXX TLD,

which would responsibly present “adult” entertainment (*i.e.*, pornographic entertainment). ICANN staff recommended that the Board not select .XXX during the “proof of concept” round because “it did not appear to meet unmet needs”, there was “controversy” surrounding the application, and the definition of benefits of .XXX was “poor”. It observed that, “at this early ‘proof of concept’ stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs.” (C-127, p. 230.) In the event, the ICANN Board authorized ICANN’s President and General Counsel to commence contract negotiations with seven applicants including three sponsored TLDs, .museum, .aero and .coop. Agreements were “subject to further Board approval or ratification.” (Minutes of the Second Annual Meeting of the Board, November 16, 2000, ICANN Exhibit G.)

13. In 2003, the ICANN Board passed resolutions for the introduction of new sponsored TLDs in another Round. The Board resolved that “upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated.” (C-78.) It posted a “Request for Proposals” (“RFP”), which included an application form setting out the selection criteria that would be used to evaluate proposals. The RFP’s explanatory notes provided that the sponsorship criteria required “the proposed sTLD [to] address the needs and interest of a ‘clearly defined community’...which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate.” Applicants had to show that the Sponsored TLD Community was (a) “Precisely defined, so it can readily be determined which persons or entities make up that community” and (b) “Comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community”. (ICANN, New gTLD Program, ICANN Exhibit N.) The sponsorship criteria further required applicants to provide an explanation of the Sponsoring Organization’s policy-formulation procedures. They additionally required the applicant to demonstrate “broad-based support” from the sponsored TLD community. None of the criteria explicitly addressed “morality” issues or the content of websites to be registered in the new sponsored domains.

14. ICANN in 2004 received ten sTLD applications, including that of ICM Registry of March 16, 2004 for a .XXX sTLD. ICM’s application was posted on ICANN’s website. Its application stated that it was to

[REDACTED]

[REDACTED] and who are interested in the [REDACTED] [REDACTED] (C-Confidential Exh. B.) The International Foundation for Online Responsibility (“IFFOR”), a Canadian organization whose creation by ICM was in process, was proposed to be ICM’s sponsoring organization. The President of ICM Registry, Stuart Lawley, a British entrepreneur, was to explain that the XXX sTLD is a

“significant step towards the goal of protecting children from adult content, and [to] facilitate the efforts of anyone who wishes to identify, filter or avoid adult content. Thus, the presence of “.XXX” in a web address would serve a dual role: both indicating to users that the website contained adult content, thereby allowing users to choose to avoid it, and also indicating to potential adult-entertainment consumers that the websites could be trusted to avoid questionable business practices.” (Lawley Witness Statement, para. 15.)

15. ICANN constituted an independent panel of experts (the “Evaluation Panel”) to review and recommend those sTLD applications that met the selection criteria. That Panel found that two of the ten applicants met all the selection criteria; that three met some of the criteria; and that four had deficiencies that could not be remedied within the applicant’s proposed framework. As for .XXX, the Evaluation Panel found that ICM was among the latter four; it fully met the technical and financial criteria but not some of the sponsorship criteria. The three-member Evaluation Panel, headed by Ms. Elizabeth Williams of Australia, that analyzed sponsorship and community questions did not believe that the .XXX application represented “a clearly defined community”; it found that “the extreme variability of definitions of what constitutes the content which defines this community makes it difficult to establish which content and associated persons or services would be in or out of the community”. The Evaluation Panel further found that the lack of cohesion in the community and the planned involvement of child advocates and free expression interest groups would preclude effective formulation of policy for the community; it was unconvinced of sufficient support outside of North America; and “did not agree that the application added new value to the Internet name space”. Its critical evaluation of ICM’s application concluded that it fell into the category of those “whose deficiencies cannot be remedied with the applicant’s proposed framework” (C-110.)

16. Because only two of ten applicants were recommended by the Evaluation Panel, and because the Board remained desirous of expanding the number of sTLDs, the ICANN Board resolved to give the other sTLD applicants further opportunity to address deficiencies found by the

Evaluation Panel. ICM Registry responded with an application revised as of December 7, 2004. It noted that the independent teams that evaluated the technical merits and business soundness of ICM's application had unreservedly recommended its approval. It submitted, contrary to the analysis of the Evaluation Panel, that ICM and IFFOR also met the sponsorship criteria. "Nonetheless, the Applicants fully understand that the topic of adult entertainment on the Internet is controversial. The Applicants also understand that the Board might be criticized whether it approves or disapproves the Proposal." (C-127, p. 176.) In accordance with ICANN's practice, ICM's application again was publicly posted on ICANN's website.

17. Following discussion of its application in the Board, ICM was invited to give a presentation to the Board, which it did in April 2005, in Mar del Plata, Argentina. Child protection and free speech advocates were among the representatives of ICM Registry. The Chairman of the Governmental Advisory Committee, Mohamed Sharil Tarmizi, was in attendance for part of the meeting as well as other meetings of the Board. ICM offered then and at ICANN meetings in Capetown (December 2004) and Luxembourg (July 2005) to discuss its proposal with the GAC or any of its members, a proposal that was not taken up (C-127, p. 231; C-170, p.2). In a letter of April 3, 2005, the GAC Chairman informed the ICANN President and CEO, Paul Twomey, that: "No GAC members have expressed specific reservations or comments, in the GAC, about applications for sTLDs in the current round." (C-158, p.1.) ICM's Mar del Plata presentation to the ICANN Board included the results of a poll conducted by XBiz in February 2005 of "adult" websites that asked: "What do you think of Internet suffixes (.sex, .xxx) to designate adult sites?" 22% of the responders checked, "A Horrible Idea"; 57% checked, "A Good Idea"; 21% checked, "It's No Big Deal Either Way". ICM, while recognizing that its proposal aroused some opposition in the adult entertainment community, maintained throughout that it fully met the RFP requirement of demonstrating that it had "broad-based support from the community to be represented". (C-45.)

18. The ICANN Board held a special meeting by teleconference on May 3, 2005, the Chairman of the ICANN Board, Dr. Vinton G. Cerf, presiding. The minutes record, in respect of the .XXX sTLD application, that there was broad discussion of whether ICM's application met the RFP criteria, "particularly relating to whether or not there was a 'sponsored community'". It was agreed to "discuss this issue" at the next Board meeting. (C-134.)

19. On June 1, 2005, the Board met by teleconference and after considerable discussion adopted the following resolutions, with a 6-3 vote in favor, 2 abstentions and 4 Board members absent:

“Resolved...the Board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .XXX sponsored top-level domain (sTLD) with the applicant.”

“Resolved...if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.” (C-120.)

20. While a few of the other applications that were similarly cleared to enter into negotiations relating to proposed commercial and technical terms, e.g., those of .JOBS, and .MOBI, contained conditions, the foregoing resolutions relating to ICM Registry contained no conditions. The .JOBS resolution, for example, specified that

“the board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .JOBS sponsored top-level domain (sTLD) with the applicant. During these negotiations, the board requests that special consideration be taken as to how broad-based policy-making would be created for the sponsored community, and how this sTLD would be differentiated in the name space.”

In contrast, the .XXX resolutions do not refer to further negotiations concerning sponsorship, nor do the resolutions refer to further consideration by the Board of the matter of sponsorship. Upon the successful conclusion of the negotiation, the terms of an agreement with ICM Registry were to be presented to the Board “for approval and authorization to enter into an agreement relating to the delegation of the sTLD”.

21. At the meeting of the Governmental Advisory Committee in Luxembourg July 11-12, 2005, under the chairmanship of Mr. Tarmizi, the foregoing resolutions gave rise to comment. The minutes contain the following summary reports:

"The Netherlands, supported by several members, including Brazil, EC and Egypt, raised the point about what appears to be a change in policy as regards the evaluation for the .xxx TLD.

"On that issue, the Chair stressed that the Board came to a decision after a very difficult and intense debate which has included the moral aspects. He wondered what the GAC could have done in this context.

"Brazil asked clarification about the process to provide GAC advice to the ICANN Board and to consult relevant communities on matter such as the creation of new gTLDs. The general public was likely to assume that GAC had discussed and approved the proposal; otherwise GAC might be perceived as failing to address the matter. This is a public policy issue rather than a moral issue.

"Denmark commented on the fact that the issue of the creation of the .xxx extension should have been presented to the GAC as a public policy issue. EC drew attention to the 2000 Evaluation report on .xxx that had concluded negatively.

"France asked about the methodology to be followed for the evaluation of new gTLDs in future and if an early warning system could be put in place. Egypt wished to clarify whether the issue was the approval by ICANN or the apparent change in policy.

"USA remarked that GAC had several opportunities to raise questions, notably at Working Group level, as the process had been open for several years. In addition there are not currently sufficient resources in the WGI to put sufficient attention to it. We should be working on an adequate methodology for the future. Netherlands commented that the ICANN decision making process was not sufficiently transparent for GAC to know in time when to reach [sic; react] to proposals.

"The Chair thanked the GAC for these comments which will be given to the attention of the ICANN Board." (C-139, p. 3.)

22. There followed a meeting of the GAC with the ICANN Board, at which the following statements are recorded in the summary minutes:

"Netherlands asked about the new criteria to be retained for new TLDs as it seems there was a shift in policy during the evaluation process.

"Mr. Twomey replied that there might be key policy differences due to learning experiences, for example it is now accepted not to put a limit on the number of new TLDs. He also noted that no comments had been received from governments regarding .xxx.

"Dr. Cerf added, taking the example of .xxx that there was a variety of proposals for TLDs before, including for this extension, but this time the way to cope with the selection was different. The proposal this time met the three main criteria, financial, technical and sponsorship. They [sic: There] were doubts expressed about the last criteria [sic] which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters.

"France remarked that there might be cases where the TLD string did infer the content matter. Therefore the GAC could be involved if public policies issues are to be raised.

"Dr. Cerf replied that in practice there is no correlation between the TLD string and the content. The TLD system is neutral, although filtering systems could be solutions promoted by governments. However, to the extent the governments do have concerns they relate to the issues across TLDs. Furthermore one could not slip into censorship.

"Chile and Denmark asked about the availability of the evaluation Report for .xxx and wondered if the process was in compliance with the ICANN Bylaws.

"Brazil asserted that content issues are relevant when ICANN is creating a space linked to pornography. He considered the matter as a public policy issue in the Brazilian context and repeated that the outside world would assume that GAC had been fully cognizant of the decision-making process.

"Mr. Twomey referred to the procedure for attention for GAC in the ICANN Bylaws that could be initiated if needed. The bylaws could work both ways: GAC could bring matters to ICANN's attention. Dr. Cerf invited GAC to comment in the context of the ICANN public

comments process. Spain suggested that ICANN should formally request GAC advice in such cases.

"The Chair [Dr. Cerf] noted in conclusion that it is not always clear what the public policy issues are and that an early warning mechanism is called for." (C-139, P. 5.)

23. When it came to drafting the GAC Communique, the following further exchanges were summarized:

"Brazil referred to the decision taken for the creation of .xxx and asked if anything could be done at this stage...

"On .xxx, USA thought that it would be very difficult to express some views at this late stage. The process had been public since the beginning, and the matter could have been raised before at Plenary or Working group level...

"Italy would be in favour of inserting the process for the creation of new TLDs in the Communique as GAC failed in some way to examine in good time the current set of proposal [sic] for questions of methodology and lack of resources.

"Malaysia recalled the difficult situation in which governments are faced with the evolution of the DNS system and the ICANN environment. ICANN and GAC should be more responsive to common issues...

"Canada raise [sic] the point of the advisory role of the GAC vis-à-vis ICANN and it would be difficult to go beyond this function for the time being.

"Denmark agreed with Canada but considered that the matter could have been raised before within the framework of the GAC; if necessary issues could be raised directly in Plenary.

"France though [sic] that the matter should be referred to in the Communique. Since ICANN was apparently limiting its consideration to financial, technical and sponsorship aspects, the content aspects should be treated as a problem for the GAC from the point of view of the general public interest."

"The Chair took note of the comments that had been made. He mentioned that the issues of new gTLDs...would be mentioned in the Communique." (C-139, p. 7.)

24. Finally, in respect of "New Top Level Domains"

"...the Chair recalled that members had made comments during the consultation period regarding the *.tel* and *.mobi* proposals, but not regarding other sTLD proposals.

"The GAC has requested ICANN to provide the Evaluation Report on the basis of which the application for *.xxx* was approved. GAC considered that some aspects of content related to top level extensions might give rise of [sic] public policies [sic] issues.

"The Chair confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the *.xxx* proposal, should it decide to do so. However, no member has yet raised this as an issue for formal comments to be given to ICANN in the Communique." (C-139, p. 13.)

25. The Luxembourg Communique of the GAC as adopted made no express reference to the application of ICM Registry nor to the June 1, 2005 ICANN Board resolutions adopted in response to it. In respect of "New Top Level Domains", the Communique stated:

"The GAC notes from recent experience that the introduction of new TLDs can give rise to significant public policy issues, including content. Accordingly, the GAC welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top Level Domains strategy. The GAC looks forward to providing advice to the process." (C-159, p. 1.)

26. Negotiations on commercial and technical terms for a contract between ICANN's General Counsel, John Jeffrey, and the counsel of ICM Registry, Ms. J. Beckwith Burr, in pursuance of the ICANN Board's resolutions of June 1, 2005, progressed smoothly, resulting in the posting in early August 2005 of the First Draft Registry Agreement. It was expected that the Board would vote on the contract at its meeting of August 16, 2005.

27. This expectation was overturned by ICANN's receipt of two letters. On August 11, 2005, Michael D. Gallagher, Assistant Secretary for

Communications and Information of the U.S. Department of Commerce, wrote Dr. Cerf, with a copy to Mr. Twomey, as follows:

"I understand that the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) is scheduled to consider approval of an agreement with the ICM Registry to operate the .xxx top level domain (TLD) on August 16, 2005. I am writing to urge the Board to ensure that the concerns of all members of the Internet community on this issue have been adequately heard and resolved before the Board takes action on this application.

"Since the ICANN Board voted to negotiate a contract with ICM Registry for the .xxx TLD in June 2005, this issue has garnered widespread public attention and concern outside of the ICANN community. The Department of Commerce has received nearly 6000 letters and emails from individuals expressing concern about the impact of pornography on families and children and opposing the creation of a new top level domain devoted to adult content. We also understand that other countries have significant reservations regarding the creation of a .xxx TLD. I believe that ICANN has also received many of these concerned comments. The volume of correspondence opposed to the creation of a .xxx TLD is unprecedented. Given the extent of the negative reaction, I request that the Board will provide a proper process and adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue.

"It is of paramount importance that the Board ensure the best interests of the Internet community as a whole are fully considered as it evaluates the addition to this new top level domain..." (C-162, p. 1.)

28. On August 12, 2005, Mohamed Sharil Tarmizi, Chairman, GAC, wrote to the ICANN Board of Directors, in his personal capacity and not on behalf of the GAC, with a copy to the GAC, as follows:

"As you know, the Board is scheduled to consider approval of a contract for a new top level domain intended to be used for adult content...

"You may recall that during the session between the GAC and the Board in Luxembourg that some countries had expressed strong positions to the Board on this issue. In other GAC sessions, a number of other governments also expressed some concern with the potential

introduction of this TLD. The views are diverse and wide ranging. Although not necessarily well articulated in Luxembourg, as Chairman, I believe there remains a strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date.

“I have been approached by some of these governments and I have advised them that apart from the advice given in relation to the creation of new TLDs in the Luxembourg Communiqué that implicitly refers to the proposed TLD, sovereign governments are also free to write directly to ICANN about their specific concerns.

“In this regard, I would like to bring to the Board’s attention the possibility that several governments will choose to take this course of action. I would like to request that in any further debate that we may have with regard to this TLD that we keep this background in mind.

“Based on the foregoing, I believe that the Board should allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD.”

29. The *volte face* in the position of the United States Government evidenced by the letter of Mr. Gallagher appeared to have been stimulated by a cascade of protests by American domestic organizations such as the Family Research Council and Focus on the Family. Thousands of email messages of identical text poured into the Department of Commerce demanding that .XXX be stopped. Copies of messages obtained by ICM under the Freedom of Information Act show that while officials of the Department of Commerce concerned with Internet questions earlier did not oppose and indeed apparently favored ICANN’s approval of the application of ICM, the Department of Commerce was galvanized into opposition by the generated torrent of negative demands, and by representations by leading figures of the so-called “religious right”, such as Jim Dobson, who had influential access to high level officials of the U.S. Administration. There was even indication in the Department of Commerce that, if ICANN were to approve a top level domain for adult material, it would not be entered into the root if the United States Government did not approve (C-165, C-166.) The intervention of the United States came at a singularly delicate juncture, in the run-up to a United Nations sponsored conference on the Internet, the World Summit on the Information Society, which was anticipated to be the forum for concentration of criticism of the continuing influence of the United States over the Internet. The *Congressional Quarterly Weekly* ran a story entitled, “Web Neutrality vs. Morality” which said: “The flap over .xxx has put ICANN

in an almost impossible position. It is facing mounting pressure from within the United States and other countries to reject the domain. But if it goes back on its earlier decision, many countries will see that as evidence of its allegiance to and lack of independence from the U.S. government. 'The politics of this are amazing,' said Cerf. 'We're damned if we do and damned if we don't.' (C-284.)

30. Doubt about the desirability of allocating a top-level domain to ICM Registry, or opposition to so doing, was not confined to the U.S. Department of Commerce, as illustrated by the proceedings at Luxembourg quoted above. A number of other governments also expressed reservations or raised questions about ICM's application on various grounds, including, at a later stage, those of Australia (letter from the Minister for Communications, Information Technology and the Arts of February 28, 2007 expressing Australia's "strong opposition to the creation of a .XXX sTLD"), Canada (comment expressing concern that ICANN may be drawn into becoming a global Internet content regulator, Exhibit DJ) and the United Kingdom (letter of May 4, 2006 stressing the importance of ICM's monitoring all .XXX content from "day one", C-182). The EC expressed the view that consultation with the GAC had been inadequate. The Deputy Director-General of the European Commission on September 16, 2005 wrote Dr. Cerf stating that the June 1, 2005 resolutions were adopted without the benefit of such consultation and added:

"Moreover, while the .xxx TLD raises obvious and predictable public policy issues, the fact that a similar application from the same applicants had been rejected in 2000 (following a negative evaluation) had, not surprisingly, led many GAC representatives to expect that a similar decision would have been reached on this occasion...such a change in approach would benefit from an explanation to the GAC.

"I would therefore ask ICANN to reconsider the decision to proceed with this application until the GAC have had an opportunity to review the evaluation report." (C-172, p. 1.)

31. The State Secretary for Communications and Regional Policy of the Government of Sweden, Jonas Bjelfvenstam, wrote Dr. Twomey a letter carrying the date of November 23, 2005, as follows:

"I have followed recent discussions by the Board of Directors of ...ICANN concerning the proposed top level domain (TLD) .xxx. I appreciate that the Board has deferred further discussions on the

subject...taking account of requests from the applicant ICM, as well as the ...GAC Chairman's and the US Department of Commerce's request to allow for additional time for comments by interested parties.

"Sweden strongly supports the ICANN mission and the process making ICANN an organization independent of the US Government. We appreciate the achievements of ICANN in the outstanding technical and innovative development of the Internet, an ICANN exercising open, transparent and multilateral procedures.

"The Swedish line on pornography is that it is not compatible with gender equality goals. The constant exposure of pornography and degrading pictures in our everyday lives normalizes the exploitation of women and children and the pornography industry profits on the documentation.

"A TLD dedicated for pornography might increase the volume of pornography on the Internet at the same time as foreseen advantages with a dedicated TLD might not materialize. These and other comments have been made in the many comments made directly to ICANN through the ICANN web site. There are a considerable number of negative reactions within and outside the Internet community.

"I know that all TLD applications are dealt with in procedures open to everyone for comment. However, in a case like this, where public interests clearly are involved, we feel it could have been appropriate for ICANN to request advice from GAC. Admittedly, GAC could have given advice to ICANN anyway at any point in time in the process and to my knowledge, no GAC members have raised the question before the GAC meeting July 9-12 in Luxembourg. However, we all probably rested assured that ICANN's negative opinion on .xxx, expressed in 2000, would stand.

"From the ICANN decision on June 1, 2005, there was too little time for GAC to have an informed discussion on the subject at its Luxembourg summer meeting. ..

"Therefore we would ask ICANN to postpone conclusive discussions on .xxx until after the upcoming GAC meeting in November 29-30 in Vancouver...In due time before that meeting, it would be helpful if ICANN could present in detail how it means that .xxx fulfils the criteria set in advance..." (C-168, p. 1.)

32. At its meeting by teleconference of September 15, 2005, the Board, "after lengthy discussion involving nearly all of the directors regarding the sponsorship criteria, the application, and additional supplemental materials, and the specific terms of the proposed agreement," adopted a resolution providing that:

" ...

"Whereas the ICANN Board has expressed concerns regarding issues relating to the compliance with the proposed .XXX Registry Agreement (including possible proposals for codes of conduct and ongoing obligations regarding potential changes in ownership)...

"Whereas, ICANN has received significant levels of correspondence from the Internet community users over recent weeks, as well as inquiries from a number of governments,

"Resolved...that the ICANN President and General Counsel are directed to discuss possible additional contractual provisions or modifications for inclusion in the XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application. Following such additional discussions, the President and General Counsel are requested to return to the board for additional approval, disapproval or advice." (C-119, p. 1.)

33. At the Vancouver meeting of the Board in December 2005, the GAC requested an explanation of the processes that led to the adoption of the Board's resolutions of June 1. Dr. Twomey replied with a lengthy and detailed letter of February 11, 2006. The following extracts are of interest:

"Where an applicant passed all three sets of criteria and there were no other issues associated with the application, the Board was briefed and the application was allowed to move on to the stage of technical and commercial negotiations designed to establish a new sTLD. One application – POST – was in this category. In other cases – where an evaluation team indicated that a set of criteria was not met, or there were other issues to be examined – each applicant was provided an opportunity to submit clarifying or additional documentation before presenting the evaluation panel's recommendation to the Board for a decision on whether the applicant could proceed to the next stage. The other nine applications, including .XXX, were in this category.

"Because of the more subjective nature of the sponsorship/community value issues being reviewed, it was decided to ask the Board to review these issues directly.

...

"It should be noted that, consistent with Article II, Section 1 of the Bylaws, it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant's readiness to proceed to technical and commercial negotiations and, subsequently, whether or not to approve delegation of a new sTLD, rests with the Board.

...

"Extensive Review of ICM Application

...

"On 3 May 2005, the Board held a 'broad discussion...regarding whether or not there was a 'sponsored community' . The Board agreed that it would discuss this issue again at the next Board Meeting.'

"Based on the extensive public comments received, the independent evaluation panel's recommendations, the responses of ICM and the proposed Sponsoring Organization (IFFOR) to those evaluations, ...at its teleconference on June 1, 2005, the Board authorized the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms with ICM. It also requested the President to present any such negotiated agreement to the Board for approval and authorization..." (C-175.)

34. Subsequent draft registry agreements of ICM were produced in response to specific requests of ICANN staff for amendments, to which requests ICM responded positively. In particular, a provision was included stating that all requirements for registration would be "in addition to the obligation to comply with all applicable law[s] and regulation[s]". (Claimant's Memorial on the Merits, pp. 128-129.)

35. Just before the Board met in Wellington, New Zealand in March 2006, the GAC convened and, among other matters, discussed the above letter of the

ICANN President of February 11, 2006. Its Communique of March 28 states that the GAC

“does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination that the application [of ICM Registry] had overcome the deficiencies noted in the Evaluation Report. The Board would request a written explanation of the Board decision, particularly with regard to the sponsored community and public interest criteria outlined in the sponsored top level domain selection criteria.

“...ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain. To the GAC’s knowledge, these undertakings have not yet been included as ICM obligations in the proposed .xxx Registry Agreement negotiated with ICANN.”

“The public policy aspects identified by members of the GAC include the degree to which the .xxx application would:

- Take appropriate measures to restrict access to illegal and offensive content;

- Support the development of tools and programs to protect vulnerable members of the community;

- Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be; and

“Without in any way implying an endorsement of the ICM application, the GAC would request confirmation from the Board that any contract currently under negotiation between ICANN and ICM Registry would include enforceable provisions covering all of ICM Registry’s commitments, and such information on the proposed contract being made available to member countries through the GAC.

“Nevertheless without prejudice to the above, several members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .xxx sTLD.”

36. At the Board’s meeting in Wellington of March 31, 2006, a resolution was adopted by which it was:

“Resolved, the President and General Counsel are directed to analyze all publicly received inputs, to continue negotiations with ICM Registry, and to return to the Board with any recommendations regarding amendments to the proposed sTLD registry agreement, particularly to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor’s policies.” (C-184, p. 1.)

37. On May 4, 2006, Dr. Twomey sent a further letter to the Chairman and members of the GAC in response to the GAC’s request for information regarding the decision of the ICANN Board to proceed with several sTLD applications, notwithstanding negative reports from one or more evaluation teams. The following extracts are of interest:

“It is important to note that the Board decision as to the .XXX application is still pending. The decision by the ICANN Board during its 1 June 2005 Special Board Meeting reviewed the criteria against the materials supplied and the results of the independent evaluations. ...the board voted to authorize staff to enter into contractual negotiations without prejudicing the Board’s right to evaluate the resulting contract and to decide whether it meets all the criteria before the Board including public policy advice such as might be offered by the GAC. The final conclusion on the Board’s decision to accept or reject the .XXX application has not been made and will not be made until such time as the Board either approves or rejects the registry agreement relating to the .XXX application. In fact, it is important to note that the Board has reviewed previous proposed agreements with ICM for the .XXX registry and has expressed concerns regarding the compliance structures established in those drafts.

...

In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement.” (C-188, pp. 1, 2.)

38. On May 10, 2006, the Board held a telephonic special meeting and addressed ICM’s by now Third Draft Registry Agreement. After a roll call, there were 9 votes against accepting the agreement and 5 in favor. Those

who voted against (including Board Chairman Cerf and President Twomey), in brief explanations of vote, indicated that they so voted because the undertakings of ICM could not in their view be fulfilled; because the conditions required by the GAC could not be met; because doubts about sponsorship remained and had magnified as a result of opposition from elements of the adult entertainment community; because the agreement's reference to "all applicable law" raised a wide and variable test of compliance and enforcement; and because guaranty of compliance with obligations of the contract was lacking. Those who voted in favor indicated that changing ICANN's position after an extended process weakens ICANN and encourages the exertions of pressure groups; found that there was sufficient support of the sponsoring community, while invariable support was not required; held it unfair to impose on ICM a complete compliance model before it is allowed to start, a requirement imposed on no other applicant; maintained that ICANN is not in the business and should not be in the business of judging content which rather is the province of each country, that ICANN should not be a "choke-point for content limitations of governments"; and contended that ICANN should avoid applying subjective and arbitrary criteria and should concern itself with the technical merits of applications. (C-189.) The vote of May 10, 2006 was not to approve the agreement as proposed "but it did not reject the application" of ICM (C-197.)

39. ICM Registry filed a Request for Reconsideration of Board Action on May 21, 2006, pursuant to Article IV, Section 2 of ICANN's Bylaws providing for reconsideration requests. (C-190.) However, after being informed by ICANN's general counsel that the Board would be prepared to consider still another revised draft agreement, ICM withdrew that request on October 29, 2006. Working as she had throughout in consultation with ICANN's staff, particularly its general counsel, Ms. Burr, on behalf of ICM, engaged in further negotiations with ICANN endeavoring to accommodate its requirements, demonstrate that the concerns raised by the GAC had been met to the extent possible, and provide ICANN with additional support for ICM's commitment to abide by the provisions of the proposed agreement. Among the materials provided, earlier and then, were a list of persons within the child safety community willing to serve on the board of IFFOR, commitments to enter into agreements with rating associations to provide tags for filtering .XXX websites and to monitor compliance with rules for the suppression of child pornography provisions, and data about a "pre-reservation service" for reservations for .XXX from webmasters operating adult sites on other ICANN-recognized top level domains. ICANN claimed to have registered more than 75,000 pre-reservations in the first six months that this service was publicly available. (Claimant's Memorial on the Merits,

pp. 138-139.) The proposed agreement was revised to include, *inter alia*, provision for imposing certain requirements on registrants; develop mechanisms for compliance with those requirements; create dispute resolution mechanisms; and engage independent monitors. ICM agreed to enter into a contract with the Family Online Safety Institute. The clause regarding registrants' obligations to comply with "all applicable law" was deleted because, in ICM's view, it had given rise to misunderstanding about whether ICANN would become involved in monitoring content. ICM maintains that, in the course of exchanges about making these revisions and preparing its Fourth Draft Registry Agreement, "ICANN never sought to have ICM attempt to re-define the sponsored community or otherwise demonstrate that it met any of the RFP criteria". (*Id.*, p. 141.)

40. On February 2, 2007, the Chairman and Chairman-Elect of the GAC wrote the Chairman of the ICANN Board, speaking for themselves and not necessarily for the GAC, as follows:

"We note that the Wellington Communique...requested clarification from the ICANN Board regarding its decision of 1 June 2005 authorising staff to enter into contractual negotiations with ICM Registry, despite deficiencies identified by the Sponsorship...Panel...we reiterate the GAC's request for a clear explanation of why the ICANN Board is satisfied that the .xxx application has overcome the deficiencies relating to the proposed sponsorship community.

"In Wellington, the GAC also requested confirmation from the ICANN Board that the proposed .xxx agreement would include enforceable provisions covering all of ICM Registry's commitments...

"...GAC members would urge the Board to defer any final decision on this application until the Lisbon meeting." (C-198.)

41. A special meeting of the ICANN Board on February 12, 2007, was held by teleconference. Consideration of the proposed .XXX Registry Agreement was introduced by Mr. Jeffrey, who asked the Board to consider (a) public comment on the proposed agreement (which had been posted by ICANN on its website) (b) advice proffered by the GAC and (c) "how ICM measures up against the RFP criteria" (C-199, p.1). He noted in relation to community input that since the initial ICM application over 200,000 pertinent emails had been sent to ICANN.

42. Rita Rodin, a new Board member, noted that she had not been on the Board at previous discussions of the ICM application, but based on her

review of the papers “she had some concerns about whether the proposal met the criteria set forth in the RFP. For example, she noted that it was not clear to her whether the sponsoring community seeking to run the domain genuinely could be said to represent the adult on-line community. However Rita requested that John Jeffrey and Paul Twomey confirm that this sort of discussion should take place during this meeting. She said that she did not want to reopen issues if they had already been decided by the Board.” (*Id.*, pp. 2-3.)

43. While there was no direct response to the foregoing request of Ms. Rodin, Dr. Cerf noted “that had been the subject of debate by the Board in earlier discussions in 2006...over the last six months, there seem to have been a more negative reaction from members of the online community to the proposal.” Rita Rodin agreed; “there seems to be a ‘splintering of support in the adult on-line community.” She was also concerned “that approval of this domain in these circumstances would cause ICM to become a de facto arbiter of policies for pornography on the Internet...she was not comfortable with ICANN saying to a self-defined group that they could define policy around pornography on the internet. This was not part of ICANN’s technical decision-making remit...” (*Id.*, p. 3) Dr. Twomey said that the Board needed to focus on whether there was a need for further public comment on the new version, the GAC comments, “and whether ICM had demonstrated to the Board’s satisfaction that it had met criteria against the RFP for sTLDs.” Dr. Cerf agreed that “the sponsorship grouping for a new TLD was difficult to define.”

44. Susan Crawford expressed the view that “no group can demonstrate in advance that they will meet the interests and concerns of all members in their community and that this was an unrealistic expectation to place on any applicant...if that test was applied to any sponsor group for a new sTLD, none would ever be approved.”

45. The Acting Chair conducted a “straw poll” of the Board as to whether members held “serious concerns” about the level of support for the creation of the domain from this sponsoring community. A majority indicated that they did, while a minority indicated that “it was an inappropriate burden to place on ICM to ensure that the entire adult online community was supportive of the proposed domain”. (*Id.*) The following resolution was unanimously adopted:

"Whereas a majority of the Board has serious concerns about whether the proposed .XXX domain has the support of a clearly-defined sponsored community as per the criteria for sponsored TLDs;

"Whereas a minority of the Board believed that the self-described community of sponsorship made known by the proponent of the .XXX domain, ICM Registry, was sufficient to meet the criteria for an sTLD.

"Resolved that:

- I. The revised version [now the fifth version of the draft agreement] be exposed to a public comment period of no less than 21 days, and
- II. ICANN staff consult with ICM and provide further information to the Board prior to its next meeting, so as to inform a decision by the Board about whether sponsorship criteria is [sic] met for the creation of a new .XXX sTLD." (*Id.*, p. 4.)

46. The Governmental Advisory Committee met in Lisbon on March 28, 2007 and issued "formal advice to the Board". It reaffirmed the Wellington Communique as "a valid and important expression of the GAC's views on .xxx. The GAC does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria." It called attention to an expression of concern by Canada that, with the revised proposed ICANN-ICM Registry agreement, "the Corporation could be moving towards assuming an ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate." (C-200, pp. 4, 5.) It also adopted "Principles Regarding New TLDs" which contain the following provision in respect of delegation of new gTLDs:

"2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process." (*Id.*, p. 12.)

47. The climactic meeting of the ICANN Board took place in Lisbon, Portugal, on March 30, 2007. A resolution was adopted by a vote of nine to five, with one abstention (that of Dr. Twomey), whose operative paragraphs provide that:

"...the board has determined that

"ICM's application and the revised agreement failed to meet, among other things, the sponsored community criteria of the RFP specification.

"Based on the extensive public comment and from the GAC's communiqués, that this agreement raises public policy issues.

"Approval of the ICM application and revised agreement is not appropriate, as they do not resolve the issues raised in the GAC communiqués, and ICM's response does not address the GAC's concern for offensive content and similarly avoids the GAC's concern for the protection of vulnerable members of the community. The board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.

"The ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire responsibility related to content and conduct.

"The board agrees with the reference in the GAC communiqué from Lisbon that under the revised agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.

Accordingly, it is resolved...that the proposed agreement with ICM concerning the .xxx sTLD is rejected and the application request for delegation of the .XXX sTLD is hereby denied."

48. Debate in the Board over adoption of the resolution was intense. Dr. Cerf, who was to vote in favor of the resolution (and hence against the ICM application) observed that he had voted in favor of proceeding to negotiate a contract.

"Part of the reason for that was to try to understand more deeply exactly how this proposal would be implemented, and seeing the contractual terms...would put much more meat on the bones of the initial proposal. I have been concerned about the definition of 'responsible'...there's uncertainty in my mind about what behavioral

patterns to expect...over time, the two years that we've considered this, there has been a growing disagreement within the adult content community as to the advisability of this proposal. As I looked at the contract...the mechanisms for assuring the behavior of the registrants in this top-level domain seemed, to me, uncertain. And I was persuaded ... that there were very credible scenarios in which the operation of IFFOR and ICM might still lead to ICANN being propelled into responding to complaints that some content on some of the registered .xxx sites didn't somehow meet the expectations of the general public this would propel ICANN and its staff into making decisions or having to examine content to decide whether or not it met the IFFOR criteria ... I would also point out that the GAC has raised public policy concerns about this particular top level domain." (C-201, p. 6.)

49. Rita Rodin said that she did not believe

"that this is an appropriate sponsored community...it's inappropriate to allow an applicant in any sTLD to simply define out ...any people that are not in favor of this TLD..as irresponsible...this will be an enforcement headache...for ICANN..way beyond the technical oversight role of ICANN's mandate...there's porn all over the Internet and...there isn't a mechanism with this TLD to have it all exclusively within one string to actually effect some of the purposes of the TLD...to be responsible with respect to the distribution of pornography, to prevent child pornography on the Internet..." (*id.*, p. 7.)

50. Peter Dengate Thrush, who favored acceptance of the ICM contract, voted against the resolution. On the issue of the sponsored community,

"there is on the evidence a sufficiently identifiable, distinct community which the TLD could serve. It's the adult content providers wanting to differentiate themselves by voluntary adoption of this labeling system. It's not affected ... by the fact that that's a self-selecting community...or impermanence of that community...This is the first time in any of these sTLD applications that we have had active opposition. And we have no metrics...to establish what level of opposition by members of the potential community might have caused us concern...the resolution I am voting against is particularly weak on this issue. On why the board thinks this community is not sufficiently identified. No fact or real rationale are provided in the resolution, and...given the considerable importance that the board has placed on this...and the cost and effort that the applicant has gone to answer the

board's concern demonstrating the existence of a sponsored community...this silence is disrespectful to the applicant and does a disservice to the community...I've also been concerned ... about the scale of the obligations accepted by the applicant...some of those have been forced upon them by the process..in the end I am satisfied that the compliance rules raise no new issues in kind from previous contracts. And I say that if ICANN is going to raise this kind of objection, then it better think seriously of getting out of the business of introducing new TLDs ... I do not think that this contract would make ICANN a content regulator..." (*Id.*, pp. 7-8.)

51. Njeri Ronge stated that, in addition to the reasons stated in the resolution, "the ICM proposal will not protect the relevant or interested community from the adult entertainment Web sites by a significant percentage; ... the ICM proposal focuses on content management which is not in ICANN's technical mandate." (*Id.*, p. 8.)

52. Susan Crawford dissented from the resolution, which she found "not only weak but unprincipled".

"I am troubled by the path the board has followed on this issue...ICANN only creates problems for itself when it acts in an ad hoc fashion in response to political pressures. ICANN...should resist efforts by governments to veto what it does...The most fundamental value of the global Internet community is that people who propose to use the Internet protocols and infrastructures for otherwise lawful purposes, without threatening the operational stability or security of the Internet, should be presumed to be entitled to do so. In a nutshell, everything not prohibited is permitted. This understanding...has led directly to the striking success of the Internet around the world. ICANN's role in gTLD policy development is to seek to assess and articulate the broadly shared values of the Internet community. We have very limited authority. I am personally not aware that any global consensus against the creation of a triple X domain exists. In the absence of such a prohibition, and given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root. It is very clear that we do not have a global shared set of values about content on line, save for the global norm against child pornography. But the global Internet community clearly does share the core value that no centralized authority should set itself up as the arbiter of what people may do together on line, absent a demonstration that most of those affected by the proposed activity agree that it should be banned...the

fact is that ICANN evaluated the strength of the sponsorship of triple X, the relationship between the applicant and the community behind the TLD, and...concluded that this criteria [sic] had been met as of June 2005. ICANN then went on to negotiate specific contractual terms with the applicant. Since then, real and AstroTurf comments – that’s an Americanism meaning filed comments claiming to be grass roots opposition that have actually been generated by organized campaigns – have come into ICANN that reflect opposition to this application. I do not find these recent comments sufficient to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed. No applicant for any sponsored TLD could ever demonstrate unanimous, cheering approval for its application. We have no metric against which to measure this opposition....We will only get in the way of useful innovation if we take the view that every new TLD must prove itself to us before it can be added to the root...what is meant by sponsorship...is that there is enough interest in a particular TLD that it will be viable. We also have the idea that registrants should participate in and be bound by the creation of policies for a particular string. Both of these requirements have been met by this applicant. There is clearly enough interest, including more than 70,000 preregistrations from a thousand or more unique registrants who are member of the adult industry, and the applicant has undertaken to us that it will require adherence to its self-regulatory policies by all of its registrants...Many of my fellow board members are undoubtedly uncomfortable with the subject of adult entertainment material. Discomfort may have been sparked anew by first the letter from individual GAC members...and second the letter from the Australian Government. But the entire point of ICANN's creation was to avoid the operation of chokepoint control over the domain name system by individual or collective governments. The idea was the U.S. would serve as a good steward for other governmental concerns by staying in the background and...not engaging in content-related control. Australia’s letter and concerns expressed...by Brazil and other countries about triple X are explicitly content-based and, thus, inappropriate...If after the creation of a triple X TLD certain governments of the world want to ensure that their citizens do not see triple X content, it is within their prerogative as sovereigns to instruct Internet access providers physically located within their territory to block such content...But content-related censorship should not be ICANN's concern...To the extent there are public policy concerns with this TLD, they can be dealt with through local laws.” (*Id.*, pp. 9-11.)

53. Demi Getschko declared that her vote in favor of the resolution was her own decision “without any kind of pressure”. (*Id.*, p. 12.) Alejandro Pisanty denied that “the board has been swayed by political pressure of any kind” and affirmed that, “ICANN has acted carefully and strictly within the rules.” He accepted “that there is no universal set of values regarding adult content other than those related to child pornography...the resolution voted is based precisely on that view, not on any view of content itself.” (*Id.*

PART THREE: THE ARGUMENTS OF THE PARTIES

The Contentions of ICM Registry

54. ICM Registry contends that (a) the Independent Review Process is an arbitration; (b) that Process does not afford the ICANN Board a “deferential standard of review”; (c) the law to be applied by that Process comprises the relevant principles of international law and local law, *i.e.*, California law, and that the particularly relevant principle is good faith; (d) in its treatment and rejection of the application of ICM Registry, ICANN did not act consistently with its Articles of Incorporation and Bylaws.

The Nature of the Independent Review Process

55. In respect of the nature of the Independent Review Process, ICM, noting that these proceedings are the first such Process brought under ICANN’s Bylaws, maintains that they are arbitral and not advisory in character. It observes that the current provisions governing the Independent Review Process were added to the Bylaws in December 2002 partly as a result of international and domestic concern about ICANN’s lack of accountability. It recalls that ICANN’s then President, Stuart Lynn, announced in a U.S. Senate hearing in 2002 that ICANN planned to “strengthen ... confidence in the fairness of ICANN decision-making through... creating a workable mechanism for speedy independent review of ICANN Board actions by experienced arbitrators...” (Claimant’s Memorial on the Merits, p. 162). His successor, Dr. Twomey, stated to a committee of the U.S. House of Representatives in 2006 that, “ICANN does have well-established principles and processes for accountability in its decision-making and in its bylaws...there is ability for appeal to...independent arbitration.” (*Id.*, p. 163.) Article IV, Section 3, of ICANN’s Bylaws provides that: “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider.” Pursuant to that provision, ICANN appointed the International Centre for Dispute Resolution (“ICDR”) of the American Arbitration Association as the international arbitration provider

(which in turn appointed the members of the instant Independent Review Panel). The term "arbitration" imports the binding resolution of a dispute. Courts in the United States – including the Supreme Court of California – have held that the term "arbitration" connotes a binding award. (*Id.*, pp. 168-169.) Article 27(1) of the ICDR Rules provides that "[a]wards...shall be final and binding on the parties. The parties undertake to carry out any such award without delay." (C-11.) The Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process specify that "the ICDR's International Arbitration Rules...will govern the Process in combination with these Supplementary Procedures." They provide that the "Independent Review Panel (IRP) refers to the neutral(s) appointed to decide the issue(s) presented." "The Declaration shall specifically designate the prevailing party." (C-12.) In view of all of the foregoing, ICM maintains that the IRP is an arbitral process designed to produce a decision on the issues that is binding on the parties.

The Standard of Review is Not Deferential

56. ICM also maintains that, contrary to the position now advanced by counsel for ICANN, ICANN's assertion that the Panel must afford the ICANN Board "a deferential standard of review" has no support in the instruments governing this proceeding. The term "independent review" connotes a review that is not deferential. Both Federal law and California law treat provision for an independent review as the equivalent of *de novo* review. In California law, when an appellate court employs independent, *de novo* review, it generally gives no special deference to the findings or conclusions of the court from which appeal is taken. (Claimant's Memorial on the Merits, with citations, pp. 173-174.) ICANN's reliance on the "business judgment rule" and the related doctrine of "judicial deference" under California law is misplaced, because under California law the business judgment rule is employed to protect directors from personal liability (typically in shareholder suits) when the directors have made good faith business decisions on behalf of the corporation. The IRP is not a court action seeking to impose individual liability on the ICANN board of directors. Rather, this is an Independent Review Process with the specific purpose of declaring "whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." As California courts have explicitly stated, "the rule of judicial deference to board decision-making can be limited ... by the association's governing documents." The IRP, to quote Dr. Twomey's testimony before Congress, is a process meant to establish a "final method of accountability."

The notion now advanced on behalf of ICANN, that this Panel should afford the Board “a deferential standard of review” and only “question” the Board’s actions upon “a showing of bad faith” is at odds with that purpose as well as with the plain meaning of “independent review”. (*Id.*, pp. 176-177.)

The Applicable Law of this Proceeding

57. Article 4 of ICANN’s Articles of Incorporation provides that, “The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with the relevant principles of international law and applicable international conventions and local law...” (C-4). The prior version of the draft Articles had provided for ICANN’s “carrying out its activities with due regard for applicable local and international law”. This language was regarded as inadequate, and was revised, as the then Interim Chairman of ICANN explained, “to mak[e] it clear that ICANN will comply with relevant and applicable international and local law”. (*Id.*, p. 180.) As ICANN’s President testified in the U.S. Congress in 2003, the International Review Process was put in place so that disputes could “be referred to an independent review panel operated by an international arbitration provider with an appreciation for and understanding of applicable international laws, as well as California not-for-profit corporation law.” (*Id.*, p. 182.) According to the Expert Report of Professor Jack Goldsmith, on which ICM relies:

“...in an attempt to bring accountability and thus legitimacy to its decisions, ICANN (a) assumed in its Articles of Incorporation an obligation to act in conformity with ‘relevant principles of international law’ and (b) in its Bylaws extended to adversely affected third parties a novel right of independent review in this arbitration proceeding for consistency with ICANN’s Articles and Bylaws. The parties have agreed to international arbitration in this forum to determine consistency with the international law standards set forth in Article 4 of the Articles of Incorporation. California law allows a California non-profit corporation to bind itself in this way.” (*Id.*, p. 11.)

In ICM’s view, Article 4 of ICANN’s Articles of Incorporation acts as a choice-of-law provision. It notes that Article 28 of the ICDR Arbitration Rules specifically provides that “the Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to this dispute.” (C-11.) It points out that the choice of a concurrent law clause – as in ICANN’s Articles providing for the application of relevant principles of both

international and domestic law – is not unusual, especially in transactions involving a public resource.

58. Professor Goldsmith observes that: "... "principles of international law and applicable international conventions and local law" refers to three types of law. Local law means the law of California. Applicable international conventions refers to treaties. "The term 'principles of international law' includes general principles of law. Given that the canonical reference to the sources of international law is Article 38 of the Statute of the International Court of Justice, which lists international conventions, customary international law, and "the general principles of law recognized by civilized nations", the reference to "principles of international law" in ICANN's Articles must refer to customary international law and to the general principles of law. (Expert Report, p. 12.) Professor Goldsmith notes that the Iran-United States Claims Tribunal has interpreted the "principles of commercial and international law" to include the general principles of law. ICSID tribunals similarly have interpreted "the rules of international law" to include general principles of law.

"It is perfectly appropriate to apply general principles in this IRP even though ICANN is technically a non-profit corporation and ICM is a private corporation. ICANN voluntarily subjected itself to these general principles in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when public goods are at stake. The 'international' nature of this arbitration – ... is evidenced by the global impact of ICANN's decisions...ICANN is only nominally a private corporation. It exercises extraordinary authority, delegated from the U.S. Government, over one of the globe's most important resources...its control over the Internet naming and numbering system does make sense of its embrace of the 'general principles' standard. While there is no doubt that ICANN can and has bound itself to general principles of law as that phrase is understood in international law... the general principles relevant here complement, amplify and give detail to the requirements of independence, transparency and due process that ICANN has otherwise assumed in its Articles and Bylaws and under California law. General principles thus play their classic supplementary role in this proceeding." (*Id.*, pp. 15-16.)

59. Professor Goldsmith continues: "The general principle of good faith is 'the foundation of all law and all conventions'" (quoting the seminal work of Bin Cheng, *General Principles of Law as Applied by International Courts and*

Tribunals, p. 105). "As the International Court of Justice has noted, 'the principle of good faith is a well established principle of international law'". (*Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 296, with many citations.) Applications of the principle are "the requirement of good faith in complying with legal restrictions" and "the requirement of good faith in the exercise of discretion, also known as the doctrine of non-abuse of rights..." as well as the requirement of good faith in contractual negotiations. (*Id.*, pp. 17-18.) The principle is "equally applicable to relations between individuals and to relations between nations." (Cheng, *loc. cit.*).

60. Professor Goldsmith maintains that the abuse of right alleged by ICM that is

"most obvious is the clearly fictitious basis ICANN gave for denying ICM's application...the concern about 'law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application' applies to many top-level domains besides .XXX. The website 'pornography.com' would be no less subject to various differing laws around the world than the website 'pornography.xxx.' ...a website on the .XXX domain is *easier* for nations to regulate and exclude from computers in their countries because they can block all sites on the .XXX domain with relative ease but have to look at the content, or make guesses based on domain names, to block unwanted pornography on .COM and other top level domains. In short, this reason for ICANN's denial, if genuine, would extend to many top-level domains and would certainly apply to all generic top-level domains (like .COM, .INFO, .NET and .ORG) where pornographic sites can be found. But ICANN has only applied this reason for denial to the .XXX domain. This strongly suggests that the reasons for the denial are pretextual and thus the denial is an abuse of right..."

61. Professor Goldsmith further argues that "similarly pretextual is ICANN's claim that 'there are credible scenarios that leads to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content.'" He contends that the scenario is "unlikely", but, more importantly, "*the same logic applies to generic top level domains* like .COM. The identical scenario could arise if a national court ordered...the registry operator for .COM...to shut down one of the hundreds of thousands of pornography sites on .COM. But ICANN has only expressed concern about ICM..."

ICANN Did Not Act Consistently with its Articles of Incorporation and Bylaws

62. ICM Registry contends that ICANN failed to act consistently with its Articles of Incorporation and Bylaws in the following respects.

63. ICANN, ICM maintains, conducted the 2004 Round of applications for top-level domains as a two-step process, in which it was first determined whether or not each applicant met the RFP criteria. If the criteria were met, "upon the successful completion of the sTLD process" (ICANN Board resolution of October 31, 2003, C-78), the applicant then would proceed to negotiate the commercial and technical terms of a registry agreement. (This Declaration, paras. 13-16, *supra*.) The RFP included detailed description of the criteria to be met to enable the applicant to proceed to contract negotiations, and specified that the selection criteria would be applied "based on principles of objectivity, non-discrimination and transparency". (C-45.) On June 1, 2005, the ICANN Board concluded that ICM had met all of the RFP criteria - - financial, technical and sponsorship - and authorized ICANN's President and General Counsel to enter into negotiations over the "commercial and technical terms" of a registry agreement with ICM. "The record evidence in this case demonstrates overwhelmingly that when the Board approved ICM to proceed to contract negotiations on 1 June 2005, the Board concluded that ICM had met all of the RFP criteria - including, specifically, sponsorship." (Claimant's Post-Hearing Submission, p. 11.) While ICANN now claims that the sponsorship criterion remained open, and that the Board's resolution of June 1, 2005, authorized negotiations in which whether ICM met sponsorship requirements could be more fully tested, ICM argues that no credible evidence, in particular, no contemporary documentary evidence, supports these contentions. To the contrary, ICM:

- (a) recalls that ICANN's written announcement of applications received provided: "The applications will be reviewed by independent evaluation teams beginning in May 2004. The criteria for evaluation were posted with the RFP. All applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs." (C-82.)

- (b) emphasizes that ICANN's Chairman of the Board, Dr. Cerf, is recorded in the GAC's Luxembourg minutes as stating, shortly after the adoption of the June 1, 2005, resolution, that the application of .xxx "this time met the three main criteria, financial, technical and sponsorship". Sponsorship was

extensively discussed "and the Board reached a positive decision considering that ICANN should not be involved in content matters." (C-139; *supra*, para. 22.)

- (c) notes that a letter of ICANN's President of February 11, 2006. states that: "...it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant's readiness to proceed to technical and commercial negotiations...rests with the Board." (*Supra*, paragraph 33.)

- (d) notes that the GAC's Wellington Communique states, in respect of a letter of February 11, 2006 of ICANN's President, that the GAC "does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination" that ICM's application "had overcome the deficiencies noted in the Evaluation Report". (*Supra*, paragraph 35.)

- (e) stresses that the ICANN Vice President in charge of the Round, Kurt Pritz, whom ICANN chose not to call as a witness in the hearing, stated in a public forum meeting in April 2005 that: "If it was determined that an application met those three baseline criteria, technical, commercial and sponsorship community, they, then, were informed that they would enter into a phase of commercial and technical negotiation with ICANN, the culmination of those negotiations is and was intended to result in the designation of the new top-level domain. At the conclusion of that, we would sign agreements that would be forwarded to the Board for their approval." (C-88.)

- (f) recalls that Dr. Pritz stated in Luxembourg that ICM was among the "applicants that have been found to satisfy the baseline criteria and they're presently in negotiation for the designation of registries..." (C-140, p. 28).

- (g) observes that the General Counsel of ICANN, Mr. Jeffery, in an exchange with Ms. Burr acting as counsel of ICM, accepted a draft press release in respect of the June 1, 2005 resolution stating that, "ICANN's board of directors today determined that the proposal for a new top level domain submitted by ICM Registry meets the criteria established by ICANN." (C-221.)

- (h) reproduces a Fox News Internet story of June 2, 2005, captioned, "Internet Group OKs New Suffix for Porn Sites," which cites ICANN spokesman Kieran Baker as saying that adult oriented sites, a \$12 billion industry, "could begin buying .xxx addresses as early as fall or winter depending on ICM's plans." (C-283.)

- (i) recalls that a member of the Board when the June 1, 2005 resolution was adopted, Joicho Ito, posted on his blog the next day that "the .XXX proposal, in my opinion, has met the criteria set out in the RFP. Our approval of .XXX is a decision based on whether .XXX met the criteria and does not endorse or condone any particular type of content or moral belief." (Burr Exhibit 35.)

ICM argues that ICANN's witnesses had no response to the foregoing evidence, other than to say that they could not remember or had not seen it (testimony of Dr. Cerf, Tr. 615:18-21, 660:9-12, 675:3-16; Testimony of Dr. Twomey, 914: 4-11, 915:2-11).

64. Dr. Cerf testified at the hearing that,

"At the point where the question arose whether we should proceed or could proceed to contract negotiation, in the absence of having decided that the sponsorship criteria had been met, the board consulted with counsel [the General Counsel, Mr. Jeffery] and my recollection of this discussion is that we could leave undetermined and undecided the question of sponsorship and could use the discussions with regard to the contract as a means of exposing and understanding more deeply whether the sponsorship criteria had been or could be adequately met...prior to the board vote on the question, should we proceed to contract, this question was raised, and it was my understanding that we were not deciding the question of sponsorship. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met or would be met..." (Tr. 600:6-18, 601: 1-8).

65. ICM however claims that Dr. Cerf's testimony "is flatly contradicted by the numerous contemporaneous statements of ICANN Board members and officials that ICM had, in fact, met the criteria, including Dr. Cerf's own contemporaneous statement to the GAC in Luxembourg..." (Claimant's Post-Hearing Submissions, p. 14.) ICM maintains that there is no contemporary documentary evidence that sustains Dr. Cerf's recollection. Nor did ICANN present Mr. Jeffery as a witness, despite his presence in the hearing room. No mention of reservations about sponsorship is to be found in the June 1, 2005 resolution; it contains no caveats, unlike the resolutions adopted in respect of the applications for .JOBS and .MOBI adopted by the Board in 2004.

66. ICANN further argues, ICM observes, that the June 1, 2005, resolution provides that the contract would be entered into "if" the parties were able to negotiate "commercial and technical terms"; therefore ICM should have known that all other issues also remained open. But, responds ICM, "Complete silence on an issue -- when other issues are specifically mentioned -- does not create ambiguity on the missing issue. It means that the missing issue is no longer an issue." (*Id.*, pp. 15-16.)

67. Shortly after adoption of the June 1, 2005 resolution, contract negotiations commenced. As predicted by Mr. Jeffrey in a June 13, 2005, email to Ms. Burr, the negotiations were "quick" and "straightforward". (C-150.) Agreement on the terms of a registry contract was reached between them by August 1, 2005. That draft registry agreement was posted on the ICANN website on August 9, 2005. The Board was scheduled to discuss it at a meeting to be held on August 16.

68. But then came the intervention of the U.S. Department of Commerce described *supra*, paragraphs 27 and 29. ICM argues that it is remarkable that the U.S. Government responded in the way it did to a lobbying campaign largely generated by the website of the Family Research Council. "What is even more remarkable is the extent to which ICANN altered its course of conduct with respect to ICM in response to the U.S. government's intervention." ICM contends that: "The unilateral intervention by the U.S. government was entirely inappropriate and ICANN knew it. But rather than adhere to the principles of its Articles and Bylaws, ICANN quickly bowed to the U.S. intervention, and, at the same time tried to conceal it." (Claimant's Post-Hearing Submission, p. 27.) The charge of concealment relates to Dr. Twomey's having "suggested" to the Chairman of the GAC that he write to ICANN requesting delay in considering the draft contract with ICM (*supra*, paragraph 28). Dr. Twomey acknowledged at the hearing that he so suggested but explained that the letter was nothing more than a confirmation of what Board members had heard weeks before from the GAC in Luxembourg. (Tr. 856:8-19, 859:1-12, 861:10-20, and *supra*, paragraphs 21-25.)

69. ICM invokes the witness statement provided by the chair of the Sponsorship Evaluation Team, Dr. Williams, who, as a fellow Australian, had a close working relationship with Dr. Twomey. She wrote that:

"The June 2005 vote should have marked the completion of the substantive discussions of the .XXX application, especially in light of the Board resolution that approved the .XXX application with no

reservations or caveats. Instead, following the vote, the ICANN Governmental Advisory Committee 'woke up' to the .XXX application, and ICANN began to feel pressure from a number of governments, especially from the United States and Australia...An open dispute with the United States would have been very damaging to ICANN's credibility, and it was therefore very difficult to resist pressure from the United States...Dr. Twomey expressed to me his anxiety about the .XXX registry agreement as a result of this [Gallagher] intervention. This concern went to the heart of ICANN's legitimacy as a quasi-independent technical regulatory organization with the power to establish the process by which new TLDs could be created and put on the root. If the United States Government disagreed with ICANN's process or decision at any point and did not enter a TLD accepted by ICANN to the root, it would call into question ICANN's authority, competence, and entire reason for existence." (Witness Statement of Elizabeth Williams, pp. 26-28.)

70. ICM points out that the Wellington Communique of the GAC (*supra*, paragraph 35) referred to "the Board determination that the [ICM] application had overcome the deficiencies noted in the Evaluation Report." ICM maintains that, at ICANN's staff prompting, ICM responded to all of the concerns raised in the GAC's Wellington Communique. Thus, the Third Draft Registry Agreement of April 18, 2006, included commitments of ICM to establish policies and procedures to label the sites on the domain, to use automated tools to detect and prevent child pornography, to maintain accurate lists of registrants and assist law enforcement agencies to identify and contact the owners of particular sites, and to ensure the intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers, drawing on domain name registry best practices (C-171).

71. ICM construes a statement of Dr. Cerf at the hearing as indicating that the reason, or a reason, why ICM ultimately did not obtain a registry agreement was that ICM could not provide adequate solutions "to deal with the problem of pornography on the Net". It counters that ICM had never undertaken to "deal with" or solve "the problem of pornography on the Net". "The purpose of .XXX was to create an sTLD where responsible adult content providers would agree, *inter alia*, to submit to technological tools to help tag and filter their sites; allow their sites to be 'crawled' for indicia of child pornography (real or virtual); and otherwise adhere to best practices for responsible members of the industry (including practices to prevent credit card fraud, spam, misuse of personal data, the sending of unsolicited

promotional email, the 'capture' of visitors to their sites, *etc.*).” (Claimant’s Post-Hearing Submission, p. 42.) However, Dr. Twomey seized on a phrase in the Wellington Communique “in order to impose an impossible burden on ICM.” According to ICM, Dr. Twomey asserted that “the GAC was now insisting that ICM be responsible for ‘enforcing restrictions’ around the world on access to illegal and offensive content.” (*Id.*, pp. 42-43.) But, ICM argues, to the extent that the GAC was requesting ICM to enforce restrictions on illegal and offensive content, ICANN was

“not merely acting outside its mission. It was also imposing a requirement on ICM that had never been imposed on any other registrant for any other top level domain, and that, indeed, no registrant could possibly fulfil. .COM, for example, is unquestionably filled with content that is considered ‘illegal and offensive’ in many countries. Some of its content is considered ‘illegal and offensive’ in all countries. Adult content can be found on numerous other TLDs...Dr. Cerf had told the GAC in Luxembourg in July 2005, when he was explaining the Board’s determination that ICM had met the RFP criteria: ‘to the extent that governments do have concerns they relate to the issues across TLDs.’ ICANN has never suggested that the registries for those other TLDs must ‘enforce’ restrictions on access to illegal or offensive content for sites on their TLDs.” (*Id.*, pp. 43-44.)

72. ICM adds that if “the GAC was in fact asking ICANN to impose such an absurd requirement on ICM, then ICANN should have told the GAC that it could not do so.” The GAC is no more than an advisory body supposed to provide “advice” on a “timely” basis. “ICANN is by no means under any obligation to do whatever the GAC tells it to do.” Indeed, ICANN’s Bylaws specifically contemplate that the Board may decide not to follow the GAC’s advice. (*Id.*, p. 44.)

73. ICM invokes the terms of the Bylaws, Section 2(1)(j), which provide that:

“The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. If no such solution can be found, the ICANN Board will state

in its final decision the reasons why the Governmental Advisory Committee's advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities." (C-5, and *supra*, paragraph 9.)

74. ICM further argues however that Dr. Twomey's reading of the Wellington Communique was not a reasonable one. The Wellington Communique recalls that "ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain...The public policy aspects identified by members of the GAC include the degree to which .xxx application would: Take appropriate measures to restrict access to illegal and offensive content..." (*Id.* p. 45; C-181). As promised in its application, ICM in fact proposed numerous measures to restrict access to illegal and offensive content. But nowhere did the GAC state that ICM should be responsible for "enforcing" the restrictions of countries on access to illegal and offensive content. ICM argues that the very fact that the GAC wanted ICM to "maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites" (C-181, p. 3) demonstrates that the GAC did *not* expect ICM to enforce various national restrictions on access to illegal and offensive content.

75. The numerous measures that ICM set out in its revised draft registry agreement in consultation with the staff of ICANN did not constitute an agreement or "representation to enforce the laws of the world on pornography" (testimony of Ms. Burr, Tr. 1044: 8-9). Actually the activation of an .XXX TLD would make it far easier for governments to restrict access to content that they deemed illegal or offensive. Indeed, as Dr. Cerf told the GAC in Luxembourg in July 2005 in defending ICANN's agreeing to enter into contract negotiations with ICM, "The TLD system is neutral, although filtering systems could be solutions promoted by governments." (C-139, p. 5.) "In other words," ICM argues, "the appropriate place for restricting access to content deemed illegal or offensive by any particular country is within that particular country. ICM offered far more tools for countries to effectuate such restrictions than have ever existed before. Thus, ICM provided 'appropriate measures to restrict access to illegal and offensive content.'" (Claimant's Post-Hearing Submission, p. 47.)

76. ICM alleges that, "Nonetheless, on 10 May 2006, the ICANN Board proceeded to reject ICM's registry agreement because, in Dr. Twomey's words, ICM had not demonstrated how it would 'ensure enforcement of these contractual terms' as they relate to various countries' individual laws

'concerning pornographic content' [citing C-189, p.6]. In other words, ICM's draft registry agreement was rejected on the basis of its inability to comply with a contractual undertaking to which it had never agreed in the first place." (*Id.*, p. 48.)

77. At that same meeting of the Board, Dr. Twomey drew attention to a letter of May 4, 2006 from Martin Boyle, UK Representative to the GAC, which read as follows:

"The discussions held by the Governmental Advisory Committee in Wellington in March have highlighted some of the key concerns, and strong opposition by some administrations, to the application for a new top-level domain for pornographic content, dot.xxx. I thought that it would be helpful to follow up those discussions by submitting directly to the ICANN Board the views of the UK Government. In preparing these views, we have consulted a number of stakeholders in the UK, including Internet safety groups...

"Having examined the proposal in detail, and recognizing ICANN's authority to grant such domain names, the UK expresses its firm view that if the dot .xxx domain name is to be authorized, it would be important that ICANN ensures that the benefits and safeguards proposed by the registry, ICM, including the monitoring of all dot.xxx content and rating of content on all servers pointed to by .xxx, are genuinely achieved from day one. Furthermore, it will be important to the integrity of ICANN's position as final approving authority for the dot.xxx domain name, to be seen as able to intervene promptly and effectively if for any reason failure on the part of ICM in any of these fundamental safeguards becomes apparent. It would also in our view be essential that ICM liaise with the relevant bodies in charge of policing illegal Internet content at national level, such as the Internet Watch Foundation (IWF) in the UK, so as to ensure the effectiveness of the solutions it proposes to avoid the further propagation of illegal content. Specifically, ICM should undertake to monitor all dot.xxx content as it proposed and cooperate closely with IWF and equivalent agencies.

"This is an important decision that the ICANN Board has to take and whatever you decide will probably attract criticism from one quarter or another. This makes it all the more important that in making a decision, you reach a clear view on the extent to which the benefits which ICM claim are likely to be sustainable and reliable." (C-182.)

78. Dr. Twomey said this about Mr. Boyle's position:

"...the contractual terms put forward by ICM to meet the sorts of public-policy concerns raised by the Governmental Advisory Committee in my view are very difficult to implement, and I retain concerns about their ability to actually be implemented in an international environment where the important phrase, 'all applicable law', would raise a very wide and variable test for enforcement and compliance. And I can't see how that will actually be achieved under the contract. The letter from the UK is an indication of the expectations of the international governmental community to ensure enforcement of these contractual terms as they individually interpret them against their own law concerning pornographic content. This will put ICANN in an untenable position." (C-189, p. 6.)

79. ICM contends that "it is impossible to reconcile the points made in Mr. Boyle's letter - *i.e.*, that ICANN should ensure that ICM delivered from "day one" on the 'benefits and safeguards' promised in its contract, and that ICM should liase with the IWF - as a requirement 'to ensure enforcement of the contractual terms as they each individually interpret them against their own law concerning pornographic content'. And even if Mr. Boyle had been making such a demand, it would have been entirely outside ICANN's mandate to impose it on ICM, and would have imposed a requirement on ICM that it has never imposed on any other registry." (Claimant's Post-Hearing Submission, p. 50.)

80. ICM however acknowledges that other members of the Board shared Dr. Twomey's analysis. It concludes that:

"...the ICANN Board was now imposing a requirement that was outside the mission of ICANN; that had never been imposed on any other registry; and that - had it been included in the RFP - would have kept any applicant from applying for an sTLD dealing with adult content." (*Id.*, p. 51.)

81. ICM observes that, following the ICANN Board's rejection of the ICM registry agreement on May 10, 2006, and then its renewed consideration of it after ICM withdrew its request for reconsideration (*supra*, paragraph 39), ICM responded to further requests of ICANN staff. It agreed to conclude a contract with what is now known as the Family Online Safety Institute ("FOSI") specifying that FOSI was "to use an automated tool to scan" the .XXX domain and develop other ways to monitor ICM's compliance with its

commitments. ICM notes that, throughout the entire negotiation process, the ICANN staff never asked ICM to change the definition of the sponsored community, which remained the same though each of the five renderings of the draft registry agreement.

82. At the Board's meeting of February 12, 2007, the question of the solidity of ICM's sponsorship was re-opened – in ICM's view, inappropriately --- as described above (*supra*, paragraphs 41-45 and C-199). ICM argues that the data that it responsively submitted to the ICANN Board in March 2007 demonstrated that its application met the RFP standard of "broad-based support from the community". 76,723 adult website names had been pre-reserved in .XXX since June 1, 2005; 1,217 adult webmasters from over 70 countries had registered on the ICM Registry website, saying that they supported .XXX. But, ICM observes, none of the Board members voting against acceptance of ICM's application at the dispositive meeting of March 30, 2007, mentioned the extensive evidence provided by ICM in support of sponsorship.

83. For the reasons set forth above in paragraphs 63-82, ICM contends that the Board's rejection of its application was not consistent with ICANN's Articles of Incorporation and Bylaws. As regards the five specific reasons for rejection set forth in the Board's resolution of March 30, 2007 (*supra*, paragraph 47), ICM makes the following allegations of inconsistency.

84. Reason 1: ICM's application and revised agreement fail to meet the sponsored community criteria of the RFP specification. ICM responds that the Board concluded by its resolution of June 1, 2005, that ICM had met the RFP's sponsorship criteria; and that the Board's abandonment of the two-step process and its reopening of sponsorship at the eleventh hour, and only in respect of ICM's application, violated ICANN's Articles and Bylaws. The manner in which it then "reapplied" the sponsorship criteria to ICM was "incoherent, discriminatory and pretextual". (Claimant's Post-Hearing Submission, pp. 61-62.) There was no evidence before the Board that ICM's support in the community was eroding. No other applicant was held to a similar standard of demonstrating community support. ICM produced sufficient evidence of what was required by the RFP: "broad-based support from the community".

85. ICANN also complained that ICM's community definition was self-identifying but that was true of numerous sTLDs; as Dr. Twomey acknowledged in a letter of May 6, 2006, "(m)embers of both .TEL and .MOBI communities are self-identified". Both sTLDs are now in the root.

86. ICANN further complained that the sponsored community as defined by ICM was not sufficiently differentiated from other adult entertainment providers. But, besides the fact that ICM had set forth numerous criteria by which members of its community would differentiate themselves from others providers of the adult community, this too could be said to apply to other TLDs. Thus .TRAVEL, much like .XXX, is designed to provide an sTLD for certain members of the industry that wish to follow the rules of a particular charter.

87. ICANN further complained that .XXX would merely duplicate content found elsewhere on the Internet. But again, the same was true for virtually all of the other sTLDs.

88. In sum "ICANN's reopening of the sponsorship criteria - which it did *only* for ICM - was unfair, discriminatory and pretextual, and a departure from transparent, fair and well documented policies...not done neutrally and objectively, with integrity and fairness...[it] singled out ICM for disparate treatment, without substantial and reasonable cause." (*Id.*, p. 65.)

89. Reason 2: based on the extensive comment and from the GAC's Communiques, ICM's agreement raises public policy issues. ICANN never precisely identified the "public policy" issues raised nor does it explain why they warrant rejection of the application. But, ICM argues, Reasons 2-5 all arise from the same flawed interpretation of the Wellington Communique and other governmental comments, namely, that ICM was to be responsible for enforcing the world's various and different laws and standards concerning pornography. That interpretation "was sufficiently absurd as to have been made in bad faith"; in any event it holds ICM to an "impossible standard", and is one never imposed on any other registrant and that no registrant could possibly perform. It led to further flawed conclusions, *viz.*, that if ICM could not meet its responsibility (and no one could) then ICANN would have to take it over, and, if it did so, ICANN would be taking on an oversight role regarding Internet content, which was beyond its technical mandate. ICANN's imposition of this impossible requirement on ICM alone was discriminatory. It rejected ICM's application on grounds that were not applied neutrally and objectively, which were suggestive of a "pretextual basis to 'cover' the real reason for rejecting .XXX, *i.e.*, that the U.S. government and several other powerful governments objected to its proposed content." (*Id.*, pp. 66-67.)

90. Reason 3: the ICM application and revised agreement do not resolve GAC's issues, its concern for offensive content and protection of the vulnerable; the Board finds that these public policy concerns cannot be

credibly resolved with the mechanisms proposed by the applicant. ICM responds that this is merely an elaboration of Reason 2. ICM's proposed agreement contained detailed provisions to address child pornography issues and detailed mechanisms that would permit the identification and filtration of content deemed to be illegal or offensive.

91. Reason 4: the ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct. ICM responds that this builds on the fallacy of Reasons 2 and 3: according to the Board's apparent reasoning, the GAC was requiring ICM to enforce local restrictions on access to illegal and offensive content and if proved unable to do so, ICANN would have to do so. ICM responds that ICANN could not properly require ICM to undertake such enforcement obligations, whether or not the GAC actually so requested. Given that it would have been discriminatory and unfeasible to require ICM to enforce varying national laws regarding adult content, ICANN would not have been obligated to take over that responsibility if ICANN were unable to fulfill it.

92. Reason 5: there are credible scenarios in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, inconsistent with its technical mandate. ICM responds that this largely restates Reason 4. ICANN interpreted the GAC's advice to require ICM to be responsible for regulating content on the Internet - a task plainly outside ICANN's mandate. ICANN then criticized ICM for taking on that task and complained that it would have to undertake the task if ICM were unable to fulfill it. But ICANN could not properly require ICM to regulate content on the Internet and ICM did not undertake to do so.

93. The above exposition of the contentions of ICM, while long, does not exhaust the full range of its arguments, which were developed at length and in detail in its Memorial and in oral argument. It does not, for example, fully set out its contentions on the effect of international law and the local law on these proceedings. The essence of that argument is that ICANN is bound to act in good faith, an argument that the Panel does not find it necessary to expound since the conclusion is not open to challenge and is not challenged by counsel for ICANN. ICANN does not accept ICM's reliance on principles of international law but it agrees that the principle of good faith is found in the corporate law of California and hence is applicable in the instant dispute.

94. The "Relief Requested" by ICM Registry consists, *inter alia*, of requesting that the Panel declare that its Declaration is binding upon ICM and ICANN; and that ICANN acted inconsistently with its Articles of Incorporation and Bylaws by:

"i. Failing to conduct negotiations in good faith and to conclude an agreement with ICM to serve as registry operator for the .XXX sTLD;

"ii. Rejecting ICM's proposed agreement to serve as registry operator...

"iii. Rejecting ICM's application on 30 March 2007, after having previously concluded that it met the RFP criteria on 1 June 2005;

"iv. Rejecting ICM's application on 30 March 2007 on the basis of the five grounds set forth...none of which were based on criteria set forth in the RFP criteria...

"v. Rejecting ICM's application after ICANN had approved ICM to proceed to contract negotiations..." (Claimant's Memorial on the Merits, pp. 265-267.)

The Contentions of ICANN

95. ICANN maintains that (a) the Independent Review Process is advisory, not arbitral; (b) the judgments of the ICANN Board are to be deferentially appraised; (c) the governing law is that of the State of California, not the principles of international law; and (d) in its treatment and disposition of the application of ICM Registry, ICANN acted consistently with its Articles of Incorporation and Bylaws.

The Nature of the Independent Review Process

96. ICANN invokes the provisions of the Bylaws that govern the IRP process, entitled, "Independent Review of Board Actions". Article IV, Section 3, provides that:

"1. ...ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

"2. Any person materially affected by a decision or action of the Board that he or she asserts is inconsistent with the Articles of

Incorporation or Bylaws may submit a request for independent review of that decision or action.

"3. Requests for such independent review shall be referred to an Independent Review Panel ("IRP") which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles and Bylaws.

"4. The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN ("the IRP Provider") using arbitrators ...nominated by that provider.

"5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.

...

"8. The IRP shall have the authority to:

...

b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

...

"12. Declarations of the IRP shall be in writing. The IRP shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

"13. The IRP operating procedures, and all petitions, claims and declarations, shall be posted on the Website when they become available.

...

"15. Where feasible, the Board shall consider the IRP declaration at the Board's next meeting." (C-5.)

97. ICANN contends that the foregoing terms make it clear that the IRP's declarations are advisory and not binding. The IRP provisions commit the Board to review and consideration of declarations of the Panel. The Bylaws direct the Board to "consider" the declaration. "The direction to 'consider' the Panel's declaration necessarily means that the Board has discretion whether and how to implement it; if the declaration were binding such as with a court judgment or binding arbitration ruling, there would be nothing to consider, only an order to implement." (ICANN's Response to Claimant's Memorial on the Merits, p. 32.) ICANN's Board is specifically directed to "review" the Panel's declarations, not to implement them. Moreover, the Board is "not even required to review or consider the declaration immediately, or at any particular time," but is encouraged to do so at the next Board meeting, where "feasible", reinforcing the fact that the Board's review and consideration of the Panel's declaration does not require its acceptance. The Panel may "recommend", but not require, interim action. If final Panel declarations were binding, it would make no sense for interim remedies to be merely recommended to the Board. (*Id.*, p. 33.)

98. ICANN maintains that the preparatory work of the Bylaws demonstrates that the Independent Review Process was designed to be advisory. The Draft Principles for Independent Review state that the IRP's authority would be persuasive, "rest[ing] on its independence, on the prestige and professional standing of its members, and on the persuasiveness of its reasoned opinions". But "the ICANN Board should retain ultimate authority over ICANN's affairs – after all, it is the Board...that will be chosen by (and is directly accountable to) the membership and supporting organizations". (*Id.*, p. 34.) The primary pertinent document, "ICANN: A Blueprint for Reform," calls for the creation of "a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws". ICM Registry's counsel in its negotiations with ICANN for a top-level domain, Ms. Burr, who as a senior official of the U.S. Department of Commerce was the principal official figure immediately involved in the creation and launching of ICANN, in addressing

the independent review process, observed that “decisions will be nonbinding, because the Board will retain final decision-making authority”. (*Ibid.*, p. 36.) In accepting recommendations for an independent review process that expressly disclaimed creation of a “Supreme Court” for ICANN, the Board changed the reference to “decisions” of the IRP to “declarations” precisely to avoid any inference that IRP determinations are binding decisions akin to those of a judicial or arbitral tribunal. (*Ibid.*, p. 38.)

99. ICANN further points out that, while the IRP Provider selected by it is the American Arbitration Association’s International Centre for Dispute Resolution, and while its Rules apply to IRP proceedings, those Rules in their application to IRP were amended to omit provision for the binding effect of an award.

The Standard of Review is Deferential

100. ICANN contends that the actions of the ICANN Board are entitled to substantial deference from this Panel. It maintains that that conclusion follows from the terms of Article 1, Section 2 of the Bylaws that set out the core values of ICANN (*supra*, paragraph 5). Article 1, Section 2 of the Bylaws provides that, “In performing its mission, the following core values should guide the decisions and actions of ICANN”; and the core values referred to in paragraph 5 of this Declaration are then spelled out. Section 2 concludes:

“These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand and to determine, if necessary, an appropriate and defensible balance among competing values.” (C-5.)

101. ICANN argues that since, pursuant to the foregoing provision, the ICANN Board “shall exercise its judgment” in the application of competing core values, and since those core values embrace the neutral, objective and fair decision-making at issue in these proceedings, “the deference expressly

accorded to the Board in implementing the core values applies..." ICANN continues:

"Thus, by its terms, the Bylaws' conferral of discretionary authority makes clear that any reasonable decision of the ICANN Board is, *ipso facto*, not inconsistent with the Bylaws and consequently must be upheld. Indeed, the Bylaws even go so far as to provide that outright departure from a core value is permissible in the judgment of the Board, so long as the Board reasonably 'exercise[s] its judgment' in determining that other relevant principles outweighed that value in the particular circumstances at hand."

While in the instant case, in ICANN's view, there was not even an arguable departure from the Articles of Incorporation or Bylaws, "...because such substantial deference is in fact due, there is no basis whatsoever for a declaration in ICM's favor because the Board's decisions in this matter were, at a minimum, clearly justified and within the range of reasonable conduct." (ICANN's Response to Claimant's Memorial on the Merits, pp. 45-47.)

102. ICANN further argues that the Bylaws governing the independent review process sustain this conclusion. Article 4, Section 3, "strictly limits the scope of independent review proceedings to the narrow question of whether ICANN acted in a manner 'inconsistent with' the Articles of Incorporation and the Bylaws. In confining the inquiry into whether ICANN's conduct was *inconsistent with* its governing documents, the presumption is one of consistency so that inconsistency must be established, rather than the reverse...independent review is not to be used as a mechanism to upset arguable or reasonable actions of the Board." (*Ibid.*, p. 48.)

103. ICANN contends, moreover, that,

"Basic principles of corporate law supply an independent basis for the deference due to the reasonable judgments of the ICANN Board in this matter. It is black-letter law that 'there is a presumption that directors of a corporation have acted in good faith and to the best interest of the corporation'...In California...these principles require deference to actions of a corporate board of directors so long as the board acted 'upon reasonable investigation, in good faith and with regard for the best interests' of the corporation and 'exercised discretion within the scope of its authority'". This includes the boards of not-for-profit corporations." (*Ibid.*, pp. 49-50.)

The Applicable Law of This Proceeding

104. ICANN contests ICM's invocation of principles of international law, in particular the principle of good faith, and allied principles, estoppel, legitimate expectations and abuse of right. It notes that ICM's invocation of international law depends upon a two-step argument: first, ICM interprets Article 4 of the Articles of Incorporation, providing that ICANN will operate for the benefit of the Internet community "in conformity with relevant principles of international law", as a "choice-of-law" provision; second, ICM infers that "any violation of any principles of international law" constitutes a violation of Article 4 (thus allegedly falling within the Panel's jurisdiction to evaluate the consistency of ICANN's actions with its Articles and Bylaws).

105. ICANN contends that that two-step argument contravenes the plain language of the governing provisions as well as their drafting history. Article 4 of the Articles does not operate as a "choice-of-law" provision for the IRP processes prescribed in the Bylaws. Rather the provisions of the Bylaws and Articles, as construed in the light of the law of California, govern the claims before the Panel. Nor are the particular principles of international law invoked by ICM relevant to the circumstances at issue in these proceedings.

106. Article 4 is quoted in full in paragraph 3 of this Declaration. The specific activities that ICANN must carry out "in conformity with the relevant principles of international law and applicable international conventions and local law" are specified in Article 3 (*supra*, paragraph 2). Thus "relevant" in Article 4 means only principles of international law relevant to the activities specified in Article 3. "ICANN did not adopt principles of international law indiscriminately, but rather to ensure consistency between its policies developed for the world-wide Internet community and well-established substantive international law on matters relevant to various stakeholders in the global Internet community, such as general principles on trademark law and freedom of expression relevant to intellectual property constituencies and governments." (ICANN's Response to Claimant's Memorial on the Merits, pp. 59-60.) The principles of international law relied upon by ICM in this proceeding – the requirement of good faith and related doctrines – are principles of general applicability, and are not specially directed to concerns relating to the Internet, such as freedom of expression or trademark law. Therefore, ICANN argues, they are not "relevant". (*Ibid.*) Article 4 does not operate as a choice-of-law provision requiring ICANN to adapt its conduct to any and all principles of international law. It is not worded as choice-of-law clauses are. As ICANN's expert, Professor David D. Caron notes, it is unlikely that a choice-of-law clause would designate three sources of law on the

same level. It is the law of California, the place of ICANN's incorporation, that – by reason of ICANN's incorporation under the law of California -- governs how ICANN runs its business and interacts with another U.S. corporation regarding a contract to be performed within the United States. The IRP provisions of the Bylaws, drafted years after the Articles of Incorporation, and their drafting history, do not even mention Article 4 of the Articles.

107. Moreover, the specification of "relevant" principles of international law in Article 4 "must mean principles of international law that apply to a private entity such as ICANN" (*id.*, p. 66.) As a private party, ICANN is not subject to law governing sovereigns. International legal principles do not apply to a dispute between private entities located in the same nation because the dispute may have global effects.

108. Furthermore, ICM's cited general principles perform no clarifying role in this proceeding. The applicable rules set forth in ICANN's Bylaws and Articles as well as California law render resort to general principles unnecessary. In any event, California law and the Bylaws and Articles themselves provide sufficient guidance for the Panel's analysis.

ICANN Acted Consistently with its Articles of Incorporation and Bylaws

109. ICANN contends that each of ICM's key factual assertions is wrong. In view of the deference that should be accorded to the judgments of the ICANN Board, the Panel should declare that ICANN's conduct was not inconsistent with its Bylaws and Articles even if ICM's treatment of the facts were largely correct (as it is not). The issues presented to the ICANN Board by ICM's .XXX sTLD application were "difficult", ICANN's Board addressed them with "great care", and devoted "an enormous amount of time trying to determine the right course of action". ICM was fully heard; the Board deliberated openly and transparently. ICANN is unaware of a corporate deliberative process more open and transparent than its own. After this intensive process, the Board twice concluded that ICM's proposal should be rejected, "with no hint whatsoever of the 'bad faith' ICM alleges." (ICANN's Response to Claimant's Memorial on the Merits, pp. 79-80.)

110. ICM's claims "begin with the notion that ICANN adopted, and was bound by, an inflexible, two-step procedure for evaluating sTLD applications. First, according to ICM, applications would be reviewed by the Evaluation Panel for the baseline selection criteria. Second, only after applications were finally and irrevocably approved by the ICANN Board would the applications

proceed to contract negotiations with ICANN staff with no ability by the Board to address any of the issues that the Board had previously raised in conjunction with the sTLD application.” But the RFP refutes this contention. It does not suggest that the Board’s “allowance for an application to proceed to contract negotiations confirms the close of the evaluation process.” ICANN recalls the public statement of Mr. Pritz in Kuala Lumpur in 2004: “Upon completion of the technical and commercial negotiations, successful applicants will be presented to the ICANN Board with *all* the associated information, so the Board can independently review the findings along with the information and make their own adjustments. *And then* final decisions will be made by the Board, and they’ll authorize staff to complete or execute the agreements with the sponsoring organizations...” (*Ibid.*, pp. 81-82.) It observes that Dr. Cerf affirmed that: “ICANN never intended that this would be a formal, ‘two-step’ process, where proceeding to contract negotiations automatically constituted a *de facto* final and irrevocable approval with respect to the baseline selection criteria, including sponsorship.” (At p. 82, quoting V. Cerf Witness Statement, para. 15.) ICANN maintains that there were “two overlapping phases in the evaluation of the sTLDs” and the Board always retained the right “to vote against a proposed sTLD should the Board find deficiencies in the proposed registry agreement or in the sTLD proposal as a whole”. (P. 83.) There was a two-stage process but the two phases could and often did overlap in time. This is confirmed not only by Dr. Cerf but by Dr. Twomey and the then Vice-Chairman of the Board, Alejandro Pisanty. Each explains that the ICANN Board retained the authority to review and assess the baseline RFP selection criteria even after an applicant was allowed to proceed to contract negotiations. After the June 1, 2005, vote, members supporting ICM’s application did not argue that the Board had already approved the .XXX sTLD. The following exchange with Dr. Cerf took place in the course of the hearing:

“Q. Now, ICM’s position in this proceeding is that if the board voted to proceed to contract negotiations, the board was at that time making a finding that a particular applicant had satisfied the technical, financial and sponsorship criteria and that that issue was closed. Is that consistent with your understanding of how the process worked?

“A. Not, it’s not. The matter was discussed very explicitly during our consideration of the ICM proposal. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met...this was not a decision that all three of the criteria had been met.” (Tr. 601:4:13.)

111. ICM's evidence is not to the contrary. That evidence shows that there were two major steps in the evaluation process. It does not show that those steps could not be overlapping. The relevant question, not answered by ICM, is whether ICANN's Bylaws required these steps to be non-overlapping. "such that contract negotiations could not commence until the satisfaction of the RFP criteria was finally and irrevocably determined..." (*Ibid.*, p. 84.)

112. ICM's claims are also based on the argument that, by its terms, the Board's resolutions of June 1, 2005 gave "unconditional" approval of the .XXX sTLD application. (The June 1, 2005 resolutions are set out *supra*, paragraph 19.) But nothing in the resolutions actually says that ICM's application satisfied the RFP criteria, including sponsorship. In fact, nothing in the resolutions expresses approval at all because it provides that "if", after entering negotiations, the applicant is able to negotiate commercial and technical terms for a contractual arrangement, those terms shall be presented to the Board for approval and authorization to enter into an agreement relating to the delegation of the sTLD. "The plain language of the resolutions makes clear that they did not themselves constitute approval of the .XXX sTLD application. The resolutions thus track the RFP, which makes clear that a 'final decision will be made by the Board' only *after* 'completion of the technical and commercial negotiations'". (*Ibid.*, p. 86.)

113. ICANN maintains that as of June 2005, there remained numerous unanswered questions and concerns regarding ICM's ability to satisfy the baseline sponsorship criteria set forth in the RFP. An important purpose of the June 1 resolutions was to permit ICM to proceed to contract negotiations in an effort to determine whether ICM's sponsorship shortcomings could be resolved in the contract.

114. The ICANN Board also permitted other applicants for sTLDs -- .JOBS and .MOBI – to proceed to contract negotiations despite open questions relating to the initial RFP criteria. However, ICM was unique among the field of sTLD applicants due to "the extremely controversial nature of the proposed sTLD, and concerns as to whether ICM had identified a 'community' that existed and actually supported the proposed sTLD...there was a significant negative response to ICM's proposed .XXX sTLD by many adult entertainment providers, the very individuals and entities who logically would be in ICM's proposed community." (*Ibid.*, p. 87.)

115. ICM's position is further refuted by continued discussion by the Board of sponsorship criteria at meetings subsequent to June 1, 2005. The fact that most Board members expressed concern about sponsorship

shortcomings after the June 1, 2005, resolutions negates any notion that the Board had conclusively determined the sponsorship issue.

116. A member of the Board elected after the June 1, 2005, vote, Rita Rodin, expressed "some concerns about whether the [ICM] proposal met the criteria set forth in the RFP..." She said that she did not want to re-open issues if they had already been decided by the Board (*supra*, paragraphs 42-43). In response to her query, no one stated that the sponsorship issue had already been decided by the Board. (ICANN'S Response to Claimant's Memorial on the Merits, p. 90.)

117. ICANN also draws attention to Dr. Twomey's letter of May 4, 2006 (*supra*, paragraph 37) in which he wrote that the Board's decision of June 1, 2005, was without prejudice to the Board's right to decide whether the contract reached with ICM meets all the criteria before the Board.

118. ICANN recalls that within days of the posting of the June 1, 2005, resolutions, GAC Chairman Tarmizi wrote Dr. Cerf expressing the GAC's "diverse and wide-ranging concerns" with the .XXX sTLD. The ICANN Board was required by the ICANN Bylaws to take account of the views of the GAC. Nor could ICANN have ignored concerns expressed by the U.S. Government and other governments. ICANN recalls the concerns expressed thereafter, in the Wellington Communique and otherwise. It observes that "some countries were concerned that, because the .XXX application would not require all pornography to be located within the .XXX domain, a new .XXX sTLD would simply result in the expansion of the number of domain names that involved pornography." (*Ibid.*, p. 102.)

119. ICANN points out that:

"In revising its proposed registry agreement to address the GAC's concerns...ICM took the position that it would install 'appropriate measures to restrict access to illegal and offensive content,' including monitoring such content globally. This was immediately controversial among many ICANN Board members because complaints about ICM's 'monitoring' would inevitably be sent to ICANN, which is neither equipped nor authorized to monitor (much less resolve) 'content-based' objections to Internet sites." (*Ibid.*, pp. 103-104.)

120. ICANN recalls Board concerns that were canvassed at its meetings of May 10, 2006, (*supra*, paragraph 38) and February 12, 2007, (*supra*, paragraphs 41-45). Board members increasingly were concluding that the results promised by ICM were unachievable. Whether their conclusions were

or were not incorrect is “irrelevant for purposes of determining whether the Board violated its Bylaws or Articles in rejecting ICM’s application.” (*Ibid.*, p. 105.) Board doubts were accentuated by growing opposition to the .XXX sTLD from elements of the online adult entertainment industry (*ibid.*).

121. The Board’s May 10, 2006 vote (*supra*, paragraph 38) rejected ICM’s then current draft, but provided ICM “yet another opportunity to attempt to revise the agreement to conform to the RFP specifications. Notably, the Board’s decision to allow ICM to continue to work the problem is directly at odds with ICM’s position that the Board decided ‘for political reasons’ to reject ICM’s application; if so, it would have been much easier for the Board to reject ICM’s application in its entirety in 2006.” (*Ibid.*, p. 106.)

122. At its meeting of February 12, 2007, (*supra*, paragraphs 41-45), concerns in the Board about whether ICM’s application enjoyed the support of the community it purported to represent were amplified.

123. At the meeting of March 30, 2007 at which ICM’s application and agreement were definitively rejected, the majority was, first, concerned by ICM’s definition of its community to include only those members of the industry who supported the creation of .XXX sTLD and its exclusion from the sponsored community of all online adult entertainment industry members who opposed ICM’s application.

“Such self-selection and extreme subjectivity regarding what constituted the content that defined the .XXX community made it nearly impossible to determine which persons or services would be in or out of the community...without a precisely defined Sponsored TLD Community, the Board could not approve ICM’s sTLD application.” (*Ibid.*, pp. 108-109.)

124. Second, ICM’s proposed community was not adequately differentiated; ICM failed to demonstrate that excluded providers had separate needs or interests from the community it sought to represent. As contract negotiations progressed, it became increasingly evident that ICM was actually proposing an unsponsored TLD for adult entertainment, “a uTLD, disguised as an sTLD, just as ICM had proposed in 2000.” (*Ibid.*, p. 209.)

125. Third, whatever community support ICM may have had at one time, it had “fallen apart by early 2007” (*ibid.*). During the final public comment period in 2007, “a vast majority of the comments posted to the public forum and sent to ICANN staff opposed ICM’s .XXX sTLD...” (p. 110). “Broad-based support” was lacking. (P. 111.) 75,000 pre-registrations for .XXX... “Out of

the over 4.2 million adult content websites in operation" hardly represents broad-based support. (P. 115.)

126. Fourth, ICM could not demonstrate that it was adding new and valuable space to the Internet name space, as required by the RFP. "In fact, the existence of industry opposition to the .XXX sTLD demonstrated that the needs of online adult entertainment industry members were met via existing TLDs without any need for a new TLD." (P. 112.)

127. Fifth and finally, ICM and its supporting organization, IFFOR, proposed to "proactively reach out to governments and international organizations to provide information about IFFOR's activities and solicit input and participation". But such measures "diluted the possibility that their policies would be 'primarily in the interests of the Sponsored TLD Community' as required by the sponsorship selection criteria." (Pp. 112-113.)

128. ICANN concludes that, "despite the good-faith efforts of both ICANN and ICM over a lengthy period of time, the majority of the Board determined that ICM could not satisfy, among other things, the sponsorship requirements of the RFP." Reasonable people might disagree – as did a minority of the Board – "but that disagreement does not even approach a violation of a Bylaw or Article of Incorporation." (P. 113.)

129. The treatment of ICM's application was procedurally fair. It was not the object of discrimination. Applications for .JOBS and .MOBI were also allowed to proceed to contractual negotiations despite open questions relating to selection criteria. ICANN applied documented policies neutrally and objectively, with integrity and fairness. ICM was provided with every opportunity to address the concerns of the Board and the GAC. ICANN did not reject ICM's application only for reasons of public policy (although they were important). ICM's application was rejected because of its inability to show how the sTLD would meet sponsorship criteria. The Board ultimately rejected ICM's application for "many of the same sponsorship concerns noted in the initial recommendation of the Evaluation Panel." (*Ibid.*, p. 124.) It also rejected the application because ICM's proposed registry agreement "would have required ICANN to manage the content of the .XXX sTLD" (p. 126). The Board took into account the views of the GAC in arriving at its independent judgment. "Had the ICANN Board taken the view that the GAC's views must in every case be followed without independent judgment, the Board presumably would have rejected ICM's application in late 2005 or early 2006, rather than waiting another full year for the parties to try to identify a resolution that would have allowed the sTLD to proceed." (*Ibid.*)

130. As to whether ICM was treated unfairly and was the object of discrimination, ICANN relies on the following statement of Dr. Cerf at the hearing:

“...I am surprised at an assertion that ICM was treated unfairly...the board could have simply accepted the recommendations of the evaluation teams and rejected the proposal at the outset...the board went out of its way to try to work with ICM through the staff to achieve a satisfactory agreement. We spent more time on this particular proposal than any other...We repeatedly defended our continued consideration of this proposal...If...ICM believes that it was treated in a singular way, I would agree that we spent more time and effort on this than any other proposal that came to the board with regard to sponsored TLDs.” (Tr. 654:3-655:7.)

PART FOUR: THE ANALYSIS OF THE INDEPENDENT REVIEW PANEL

The Nature of the Independent Review Panel Process

131. ICM and ICANN differ on the question of whether the Declaration to be issued by the Independent Review Panel is binding upon the parties or advisory. The conflicting considerations advanced by them are summarized above at paragraphs 51 and 91-94. In the light of them, the Panel acknowledges that there is a measure of ambiguity in the pertinent provisions of the Bylaws and in their preparatory work.

132. ICANN's officers testified before committees of the U.S. Congress that ICANN had installed provision for appeal to “independent arbitration” (*supra*, paragraph 55). Article IV, Section 3 of ICANN's Bylaws specifies that, “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider”. The provider so chosen is the American Arbitration Association's International Centre for Dispute Resolution (“ICDR”), whose Rules (at C-11) in Article 27 provide for the making of arbitral awards which “shall be final and binding on the parties. The parties undertake to carry out any such award without delay.” The Rules of the ICDR “govern the arbitration” (Article 1). It is unquestioned that the term, “arbitration” imports production of a binding award (in contrast to conciliation and mediation). Federal and California courts have so held. The Supplementary Procedures adopted to supplement the independent review procedures set forth in ICANN's Bylaws provide that the ICDR's “International Arbitration Rules...will govern the process in combination with these Supplementary Procedures”. (C-12.) They specify

that the Independent Review Panel refers to the neutrals “appointed to decide the issue(s) presented” and further specify that, “DECLARATION refers to the decisions/opinions of the IRP”. “The DECLARATION shall specifically designate the prevailing party.” All of these elements are suggestive of an arbitral process that produces a binding award.

133. But there are other indicia that cut the other way, and more deeply. The authority of the IRP is “to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” – to “declare”, not to “decide” or to “determine”. Section 3(8) of the Bylaws continues that the IRP shall have the authority to “recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP”. The IRP cannot “order” interim measures but do no more than “recommend” them, and this until the Board “reviews” and “acts upon the opinion” of the IRP. A board charged with reviewing an opinion is not charged with implementing a binding decision. Moreover, Section 3(15) provides that, “Where feasible, the Board shall consider the IRP declaration at the Board’s next meeting.” This relaxed temporal proviso to do no more than “consider” the IRP declaration, and to do so at the next meeting of the Board “where feasible”, emphasizes that it is not binding. If the IRP’s Declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on “Form and Effect of an IRP Declaration”, significantly omit the provision of Article 27 of the ICDR Rules specifying that award “shall be final and binding on the parties”. (C-12.) Moreover, the preparatory work of the IRP provisions summarized above in paragraph 93 confirms that the intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.

134. In the light of the foregoing considerations, it is concluded that the Panel’s Declaration is not binding, but rather advisory in effect.

The Standard of Review Applied by the Independent Review Process

135. For the reasons summarized above in paragraph 56, ICM maintains that this is a *de novo* review in which the decisions of the ICANN Board do not enjoy a deferential standard of review. For the reasons summarized above in paragraphs 100-103, ICANN maintains that the decisions of the Board are entitled to deference by the IRP.

136. The Internet Corporation for Assigned Names and Numbers is a not-for-profit corporation established under the law of the State of California. That law embodies the “business judgment rule”. Section 309 of the California Corporations Code provides that a director must act “in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders...” and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In “recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization” – including ICANN -- ICANN is charged with “promoting the global public interest in the operational stability of the Internet...” ICANN “shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law...” Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN’s sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and non-profit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN’s Articles and Bylaws and of specific representations of ICANN – as in the RFP – that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.

The Applicable Law of this Proceeding

137. The contrasting positions of the parties on the applicable law of this proceeding are summarized above at paragraphs 59-62 and 104-109. Both parties agree that the “local law” referred to in the provision of Article 4 of the Articles of Incorporation – “The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international

conventions and local law” – is the law of California. But they differ on what are “relevant principles of international law” and their applicability to the instant dispute.

138. In the view of ICM Registry, principles of international law are applicable; that straightforwardly follows from their specification in the foregoing phrase of Article 4 of the Articles, and from the reasons given in introducing that specification. (*Supra*, paragraphs 53-54.) Principles of international law in ICM’s analysis include the general principles of law recognized as a source of international law in Article 38 of the Statute of the International Court of Justice. Those principles are not confined, as ICANN argues, to the few principles that may be relevant to the interests of Internet stakeholders, such as principles relating to trademark law and freedom of expression. Rather they include international legal principles of general applicability, such as the fundamental principle of good faith and allied principles such as estoppel and abuse of right. ICM’s expert, Professor Goldsmith, observes that there is ample precedent in international contracts and in the holdings of international tribunals for the proposition that non-sovereigns may choose to apply principles of international law to the determination of their rights and to the disposition of their disputes.

139. ICANN and its expert, Professor David Caron, maintain that international law essentially governs relations among sovereign States; and that to the extent that such principles are “relevant” in this case, it is those few principles that are applicable to a private non-profit corporation that bear on the activities of ICANN described in Article 3 of its Articles of Incorporation (*supra*, paragraph 2). General principles of law, such as that of good faith, are not imported by Article 4 of ICANN’s Articles of Incorporation; still less are principles derived from treaties that protect legitimate expectations. Nor is Article 4 of the Articles a choice-of-law provision; in fact, no governing law has been specified by the disputing parties in this case. If ICANN, by reason of its functions, is to be treated as analogous to public international organizations established by treaty (which it clearly is not), then a relevant principle to be extracted and applied from the jurisprudence of their administrative tribunals is that of deference to the discretionary authority of executive organs and of bodies whose decisions are subject to review.

140. In the view of the Panel, ICANN, in carrying out its activities “in conformity with the relevant principles of international law,” is charged with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law.

That follows from the terms of Article 4 of its Articles of Incorporation and from the intentions that animated their inclusion in the Articles, an intention that the Panel understands to have been to subject ICANN to relevant international legal principles because of its governance of an intrinsically international resource of immense importance to global communications and economies. Those intentions might not be realized were Article 4 interpreted to exclude the applicability of general principles of law.

141. That said, the differences between the parties on the place of principles of international law in these proceedings are not of material moment to the conclusions that the Panel will reach. The paramount principle in play is agreed by both parties to be that of good faith, which is found in international law, in the general principles that are a source of international law, and in the corporate law of California.

The Consistency of the Action of the ICANN Board with the Articles of Incorporation and Bylaws

142. The principal – and difficult – issue that the Panel must resolve is whether the rejection by the ICANN Board of the proposed agreement with ICM Registry and its denial of the application’s request for delegation of the .XXX sTLD was or was not consistent with ICANN’s Articles of Incorporation and Bylaws. The conflicting contentions of the parties on this central issue have been set forth above (paragraphs 63-93, 109-131).

143. The Panel will initially consider the primary questions of whether by adopting the resolutions of June 1, 2005, the ICANN Board determined that the application of ICM Registry met the sponsorship criteria, and, if so, whether that determination was definitive and irrevocable.

144. The parties agree that, pursuant to the RFP, applications for sTLDs were to be dealt with in two stages. First, the Evaluation Panel was to review applications and recommend those that met the selection criteria. Second, those applicants that did meet the selection criteria were to proceed to negotiate commercial and technical terms of a contract with ICANN’s President and General Counsel. If and when those terms were agreed upon, the resultant draft contract was to be submitted to the Board for approval. As it turned out, the Board was not content with the fact that the Evaluation Panel positively recommended only a few applications. Accordingly the Board itself undertook to consider and decide whether the other applications met the selection criteria.

145. In the view of the Panel, which has weighed the diverse evidence with care, the Board did decide by adopting its resolutions of June 1, 2005, that the application of ICM Registry for a sTLD met the selection criteria, in particular the sponsorship criteria. ICM contends that that decision was definitive and irrevocable. ICANN contends that, while negotiating commercial and technical terms of the contract, its Board continued to consider whether or not ICM's application met sponsorship criteria, that it was entitled to do so, and that, in the course of that process, further questions about ICM's application arose that were not limited to matters of sponsorship, which the Board also ultimately determined adversely to ICM's application.

146. The considerations that militate in favor of ICM's position are considerable. They are summarized above in paragraphs 63, 65 and 66. ICM argues that these considerations must prevail because they are sustained by contemporary documentary evidence, whereas the contrary arguments of ICANN are not.

147. The Panel accepts the force of the foregoing argument of ICM insofar as it establishes that the June 1, 2005, resolutions accepted that ICM's application met the sponsorship criteria. The points summarized in subparagraphs (a) through (i) of paragraph 63 above are in the view of the Panel not adequately refuted by the recollections of ICANN's witnesses, distinguished as they are and candid as they were. Their current recollection, the sincerity of which the Panel does not doubt, is that it was their understanding in adopting the June 1, 2005 resolution that the Board was entitled to continue to examine whether ICM's application met the sponsorship criteria, even if it had by adopting that resolution found those criteria to have been provisionally met (which they challenge). While that understanding is not supported by factors (a) through (i) of paragraph 63, it nevertheless can muster substantial support on the question of whether any determination that sponsorship criteria had been met was subject to reconsideration.

148. Support on that aspect of the matter consists of the following:

- (a) The resolutions of June 1, 2005 (*supra*, paragraph 19) make no reference to the satisfaction of sponsorship criteria or to whether that question is definitively resolved.
- (b) Those resolutions however expressly provide that the approval and authorization of the Board is required to enter into an agreement relating to

the delegation of the sTLD; that being so, the Board viewed itself to be entitled to review all elements of the agreement before approving and authorizing it, including whether sponsorship criteria were met.

- (c) At the meeting of the GAC in July, 2005, some six weeks after the adoption by the Board of its resolutions of June 1, in the course of preparing the GAC Communique, the GAC Chair "confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the .xxx proposal, should it decide to do so." (*Supra*, paragraph 24.) Since on the advice of counsel the GAC could still advise ICANN about the .XXX proposal, and since questions had been raised in the GAC about whether ICM's application met sponsorship criteria in the light of the appraisal of the Evaluation Panel, it may seem to follow that that advice could embrace the question of whether sponsorship criteria had been met and whether any such determination was subject to reconsideration. In point of fact, after June 1, 2005, a number of members of the GAC challenged or questioned the desirability of approving the ICM application on a variety of grounds, including sponsorship (*supra*, paragraphs 21-25, 40).

- (d) At its teleconference of September 15, 2005, there was "lengthy discussion involving nearly all of the directors regarding the sponsorship criteria..." (*supra*, paragraph 32). That imports that the members of the Board did not regard the question of sponsorship criteria to have been closed by the adoption of the resolutions of June 1, 2005.

- (e) In a letter of May 4, 2006, the President Twomey wrote the Chairman and Members of the GAC noting

"that the Board decision as to the .XXX application is still pending...the Board voted to authorize staff to enter into contractual negotiations without prejudicing the Board's right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as might be offered by the GAC... Due to the subjective nature of the sponsorship related criteria that were reviewed by the Sponsorship Evaluation Team, additional materials were requested from each applicant to be supplied directly for Board review and consideration...In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be

addressed by contractual obligations to be stated in a registry agreement." (C-188, and *supra*, paragraph 37.)

- (f) At a Board teleconference of February 12, 2007, ICANN's General Counsel asked the Board to consider "how ICM measures up against the RFP criteria," a request that implies that questions about whether such criteria had been met were not foreclosed. (*Supra*, paragraph 41.)
- (g) ICM provided data to ICANN staff, in the course of the preparation of its successive draft registry agreements, that bore on sponsorship. It has not placed in evidence contemporaneous statements that in its view such data was not relevant to continued consideration of its application on the ground that it had met sponsorship criteria or that the Board's June 1, 2005 resolutions foreclosed further consideration of sponsorship criteria. It is understandable that it did not do so, because it was in the process of endeavoring to respond positively to every request of the ICANN Board and staff that it could meet in the hope of promoting final approval of its application; but nevertheless that ICM took part in a continuing dialogue on sponsorship criteria suggests that it too did not regard, or at any rate, treat, that question as definitively resolved by adopted of the June 1, 2005 resolutions.
- (h) When Rita Rodin, a new member of the Board, raised concerns about ICM's meeting of sponsorship criteria at the Board's teleconference of February 12, 2007, she said that she did "not wish to reopen issues if they have already been decided by the Board" and asked the President and General Counsel to confirm that the question was open for discussion. There was no direct reply but the tenor of the subsequent discussion indicates that the Board did not view the question as closed. (During the Board's debate over adoption of its climactic resolution of March 30, 2007, Susan Crawford said that opposition to ICM's application was not sufficient "to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed.") (*Supra*, paragraph 52.)

149. While the Panel has concluded that by adopting its resolutions of June 1, 2005, the Board found that ICM's application met financial, technical and sponsorship criteria, less clear is whether that determination was subject to reconsideration. The record is inconclusive, for the conflicting reasons set forth above in paragraphs 63, 65 and 66 (on behalf of ICM) and paragraph 149 (on behalf of ICANN). The Panel nevertheless is charged with arriving at a conclusion on the question. In appraising whether ICANN on this issue "applied documented policies, neutrally and objectively, with integrity and

fairness" (Bylaws, Section 2(8), the Panel finds instructive the documented policy stated in the Board's Carthage resolution of October 31, 2003 on "Finalization of New sTLD RFP," namely, that an agreement "reflecting the commercial and technical terms shall be negotiated upon the successful completion of the sTLD selection process." (C-78, p. 4.) In the Panel's view, the sTLD process was "successfully completed", as that term is used in the Carthage RFP resolution, in the case of ICM Registry with the adoption of the June 1, 2005, resolutions. ICANN should, pursuant to the Carthage documented policy, then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM's application met sponsorship criteria. As Dr. Williams, chair of the Evaluation Panel, testified, the RFP process did not contemplate that new criteria could be added after the [original] criteria had been satisfied. (Tr. 374: 1719). It is pertinent to observe that the GAC's proposals for new TLDs generally exclude consideration of new criteria (*supra*, paragraph 46).

150. In so concluding, the Panel does not question the integrity of the ICANN Board's disposition of the ICM Registry application, still less that of any of the Board's members. It does find that reconsideration of sponsorship criteria, once the Board had found them to have been met, was not in accord with documented policy. If, by way of analogy, there was a construction contract at issue, the party contracting with the builder could not be heard to argue that specifications and criteria defined in invitations to tender can be freely modified once past the qualification stage; the conditions of any such modifications are carefully circumscribed. Admittedly in the instant case the Board was not operating in a context of established business practice. That fact is extenuating, as are other considerations set out above. The majority of the Board appears to have believed that was acting appropriately in reconsidering the question of sponsorship (although a substantial minority vigorously differed). The Board was pressed to do so by the Government of the United States and by quite a number of other influential governments, and ICANN was bound to "duly take into account" the views of those governments. It is not at fault because it did so. It is not possible to estimate just how influential expressions of governmental positions were. They were undoubtedly very influential but it is not clear that they were decisive. If the Board simply had yielded to governmental pressure, it would have disposed of the ICM application much earlier. The Panel does not conclude that the Board, absent the expression of those governmental positions, would necessarily have arrived at a conclusion favorable to ICM. It accepts the affirmation of members of the Board that they did not vote against acceptance of ICM's application because of governmental pressure. Certainly there are those, including Board members,

who understandably react negatively to pornography, and, in some cases, their reactions may be more visceral than rational. But they may also have had doubts, as did the Board, that ICM would be able successfully to achieve what it claimed .XXX would achieve.

151. The Board's resolution of March 30, 2007, rejecting ICM's proposed agreement and denying its request for delegation of the .XXX sTLD lists four grounds for so holding in addition to failure to meet sponsored community criteria (*supra*, paragraph 47). The essence of these grounds appears to be the Board's understanding that the ICM application "raises significant law enforcement compliance issues ... therefore obligating ICANN to acquire responsibility related to content and conduct ... there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate." ICM interprets these grounds, and statements of Dr. Twomey and Dr. Cerf, as seeking to impose on ICM responsibility for "enforcing restrictions around the world on access to illegal and offensive content" (*supra*, paragraph 66-67). ICM avers that it never undertook "to enforce the laws of the world on pornography", an undertaking that it could never discharge. It did undertake, in the event of the approval and activation of .XXX, to install tools that would make it far easier for governments to restrict access to content that they deemed illegal and offensive. ICM argues that its application was rejected in part because of its inability to comply with a contractual undertaking to which it never had agreed in the first place (*supra*, paragraphs 66-71). To the extent that this is so – and the facts and the conclusions drawn from the facts by the ICANN Board in its resolution of March 30, 2007, in this regard are not fully coherent – the Panel finds ground for questioning the neutral and objective performance of the Board, and the consistency of its so doing with its obligation not to single out ICM Registry for disparate treatment.

PART FIVE: CONCLUSIONS OF THE INDEPENDENT REVIEW PANEL

152. The Panel concludes, for the reasons stated above, that:

First, the holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award.

Second, the actions and decisions of the ICANN Board are not entitled to deference whether by application of the "business judgment" rule or otherwise; they are to be appraised not deferentially but objectively.

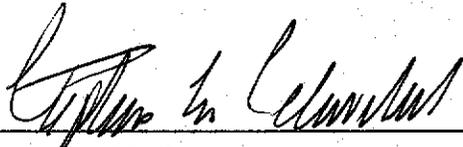
Third, the provision of Article 4 of ICANN's Articles of Incorporation prescribing that ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law," requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.

Fourth, the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria.

Fifth, the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.

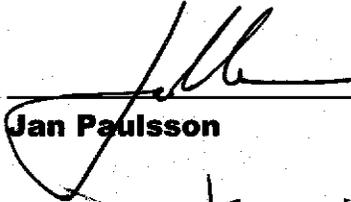
Sixth, in respect of the first foregoing holding, ICANN prevails; in respect of the second foregoing holding, ICM Registry prevails; in respect of the third foregoing holding, ICM Registry prevails; in respect of the fourth foregoing holding, ICM Registry prevails; and in respect of the fifth foregoing holding, ICM Registry prevails. Accordingly, the prevailing party is ICM Registry. It follows that, in pursuance of Article IV, Section 3(12) of the Bylaws, ICANN shall be responsible for bearing all costs of the IRP Provider. Each party shall bear its own attorneys' fees. Therefore, the administrative fees and expenses of the International Centre for Dispute Resolution, totaling \$4,500.00, shall be borne entirely by ICANN, and the compensation and expenses of the Independent Review Panel, totaling \$473,744.91, shall be borne entirely by ICANN. ICANN shall accordingly reimburse ICM Registry with the sum of \$241,372.46, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICM Registry.

Judge Tevrizian is in agreement with the first foregoing conclusion but not the subsequent conclusions. His opinion follows.



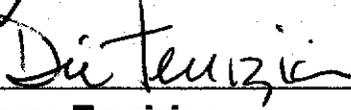
Stephen M. Schwebel

Date: February 19, 2010



Jan Paulsson

Date: 16 February 2010



Dickran Tevzian

Date: February 18, 2010

CONCURRING AND DISSENTING OPINION

I concur and expressly join in the Panel's conclusion that the holdings of the Independent Review Panel are advisory in nature and do not constitute a binding arbitral award. I adopt the rationale and the reasons stated by the Panel on this issue only.

However, I must respectfully dissent from my learned colleagues as to the remainder of their findings. I am afraid that the majority opinion will undermine the governance of the internet community by permitting any disgruntled person, organization or governmental entity to second guess the administration of one of the world's most important technological resources.

I

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (hereinafter "ICANN") is a uniquely created institution: a global, private, not-for-profit organization incorporated under the laws of the State of California (Calif. Corp. Code 5100, et seq.) exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System or "DNS." The DNS is the gateway to the nearly infinite universe of names and numbers that allow the Internet to function.

ICANN is a public benefit, non-profit corporation that was established under the law of the State of California on September 30, 1998. ICANN's Articles of Incorporation were finalized and adopted on November 21, 1998, and its By-Laws were finalized and adopted on the same day as its Articles of Incorporation.

Article 4 of ICANN's Articles of Incorporation sets forth the standard of conduct under which ICANN is required to carry out its activities and mission to protect the stability, integrity and utility of the Internet Domain Name System on behalf of the global Internet community pursuant to a series of agreements with the United States Department of Commerce. ICANN is headquartered in Marina del Rey, California, U.S.A.

Article 4 of ICANN's Articles of Incorporation specifically provide:

"The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."

ICANN serves the function as the DNS root zone administrator to ensure and is required by its Articles of Incorporation to be a neutral and open facilitator of Internet coordination. ICANN's function and purpose was never meant to be content driven in any respect.

The Articles of Incorporation provide that ICANN is managed by a Board of Directors ("Board"). The Board consists of 15 voting directors and 6 non-voting liaisons from around the world, "who in the aggregate [are to] display diversity in geography, culture, skills, experience and perspective." (Article VI, § 2). The voting directors are composed of: (1) six representatives of ICANN's Supporting Organizations, which are sub-groups dealing with specific sections of the policies under ICANN's purview; (2) eight independent representatives of the general public interest, currently selected through ICANN's Nominating Committee, in which all the constituencies of ICANN are represented; and (3) the President and CEO, who is appointed by the rest of the Board. Consistent with ICANN's mandate to provide private sector technical leadership in the management of the DNS, "no official of a national government" may serve as a director. (Article VI, § 4). In carrying out its functions, it is obvious that ICANN is expected to solicit and will receive input from a wide variety of Internet stakeholders and participants.

ICANN operates through its Board of Directors, a Staff, An Ombudsman, a Nominating Committee for Directors, three Supporting Organizations, four Advisory Committees and numerous other stakeholders that participate in the unique ICANN process. (By-Laws Articles V through XI).

As was stated earlier, ICANN was formed under the laws of the State of California as a public benefit, non-profit corporation. As such, it would appear that California Corporations Code Section 5100, et seq., together with ICANN's Articles of Incorporation and By-Laws, control its governance and accountability.

In general, a non-profit director's fiduciary duties include the duty of care, which includes an obligation of due inquiry and the duty of loyalty among others. The term "fiduciary" refers to anyone who holds a position requiring trust, confidence and scrupulous exercise of good faith and candor. It includes anyone who has a duty, created by a particular undertaking, to act primarily for the benefit of others in matters connected with the undertaking. A fiduciary relationship is one in which one person reposes trust and confidence in another person, who "must exercise a corresponding degree of fairness and good faith." (Blacks Law Dictionary). The type of persons who are commonly referred to as fiduciaries include corporate directors. The California Corporation's Code makes no distinction between

directors chosen by election and directors chosen by selection or designation in the application of fiduciary duties.

Directors of non-profit corporations in California owe a fiduciary duty to the corporation they serve and to its members, if any. See Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., (1981) 114 CA3d 783, 799; Burt v. Irvine Co., (1965) 237 CA2d 828, 852. See also, Harvey v. Landing Homeowners Assn., (2008) 162 CA4th 809, 821-822.

The "business judgment rule" is the standard the California courts apply in deciding whether a director, acting without a financial interest in the decision, satisfied the requirements of careful conduct imposed by the California Corporations Code. See Gaillard v. Natomas Co., (1989) 208 CA3d 1250, 1264. The rule remains a creature of common law. Some California courts define it as a standard of reasonable conduct. See Burt v. Irvine Co., (1965) 237 CA2d 828, while others speak of actions taken in good faith. See Marble v. Latchford Glass Co., (1962) 205 CA2d 171. While, still others examine whether the director "rationally believes that the business judgment is in the best interests of the corporation." See Lee v. Interinsurance Exch., (1996) 50 CA4th 694.

The business judgment rule is codified in Section 309 of the California Corporations Code, which provides that a director must act "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." Cal. Corp. Code § 309(a); see also Lee v. Interinsurance Exch., (1996) 50 CA4th 694, 714. Section 309 shields from liability directors who follow its provisions: "A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director." Cal. Corp. Code § 309 (c).

II

THE ACTIONS OF THE ICANN BOARD OF DIRECTORS ARE ENTITLED TO SUBSTANTIAL DEFERENCE FROM THE INDEPENDENT REVIEW PANEL

ICANN's By-Laws, specifically Article I, § 2, sets forth 11 core values and concludes as follows:

"These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new

situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”

The By-Laws make it clear that the core values must not be construed in a “narrowly prescriptive” manner. To the contrary, Article I, § 2, provides that the ICANN Board is vested with board discretion in implementing its responsibility such as is mentioned in the business judgment rule.

III

PRINCIPLES OF INTERNATIONAL LAW DO NOT APPLY

Article 4 of the ICANN Articles of Incorporation does not preempt the California Corporations Code as a “choice-of-law provision” importing international law into the independent review process. Rather, the substantive provisions of the By-Laws and Articles of Incorporation, as construed in light of the law of California, where ICANN is incorporated as a non-profit entity, should govern the claims before the Independent Review Panel (hereinafter “IRP”).

Professor Caron opined that principles of international law do not apply because, as a private entity, ICANN is not subject to that body of law governing sovereigns. To adopt a more expansive view is tantamount to judicial legislation or mischief.

IV

THE ICANN BOARD OF DIRECTORS DID NOT ACT INCONSISTENTLY WITH ICANN’S ARTICLES OF INCORPORATION AND BY-LAWS IN CONSIDERING AND ULTIMATELY DENYING ICM REGISTRY, LLC’S APPLICATION FOR A SPONSORED TOP LEVEL DOMAIN NAME

On March 30, 2007, the ICANN Board of Directors approved a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. The findings of the Board was that the application was deficient in that the applicant, ICM Registry, LLC, (hereinafter “ICM”), failed to satisfy the

Request For Proposal (“hereinafter “RFP”) posted June 24, 2003, in the following manner:

- “1. ICM’s definition of its sponsored TLD community was not capable of precise or clear definition;
2. ICM’s policies were not primarily in the interests of the sponsored TLD community;
3. ICM’s proposed community did not have needs and interests which are differentiated from those of the general global Internet community;
4. ICM could not demonstrate that it had the requisite community support; and,
5. ICM was not adding new and valuable space to the Internet name space.”

On December 15, 2003, ICANN posted a final RFP for a new round of sponsored Top Level Domain Names (hereinafter “STLD”). On March 16, 2004, ICM submitted its application for the .XXX STLD name. From the inception, ICM knew that its .XXX application would be controversial. From the time that ICM submitted its applications until the application was finally denied on March 30, 2007, ICM never was able to clearly define what the interests of the .XXX community would be or that ICM had adequate support from the community it sought to represent.

ICM has claimed during these proceedings that the RFP posted by ICANN established a non-overlapping two-step procedure for approving new STLDs, under which applications would first be tested for baseline criteria, and only after the applications were finally and irrevocably approved by the ICANN Board could the applications proceed to technical and commercial contract negotiations with ICANN staff. ICM forcefully argues that on June 1, 2005, the ICANN Board irrevocably approved the ICM .XXX STLD application so as to be granted vested rights to enter into registry agreement negotiations dealing with economic issues only. The evidence introduced at the independent review procedure refutes this contention. Nothing contained in the ICANN RFP permits this interpretation.

Before the ICANN Board could approve a STLD application, applicants had to satisfy the baseline selection criteria set forth in the RFP, including the technical, business, financial and sponsorship criteria, and also negotiate an acceptable registry contract with ICANN staff. A review of the relevant documents and testimony admitted into evidence established that the two phases could overlap in time.

The fact that most ICANN Board members expressed significant concerns about ICM’s sponsorship shortcomings after the June 1, 2005,

resolutions negates any notion that the June 1, 2005, resolutions (which do not say that the Board is approving anything and, to the contrary, state clearly that the ICANN Board is not doing so) conclusively determined the sponsorship issue.

The sponsorship issues and shortcomings in ICM's application were also raised by ICANN Board members who joined the ICANN Board after the June 1, 2005, resolutions. Between the June 2005 and February 2007 ICANN Board meetings, there were a total of six new voting Board members (out of a total of fifteen) considering ICM's application.

Both Dr. Cerf and Dr. Pisanty testified during the evidentiary hearing that the ICANN Board's vote on June 1, 2005, made clear that the Board's vote was intended only to permit ICM to proceed with contract negotiations. Under no circumstances was ICANN bound by the vote to award the .XXX STLD to ICM because the resolution that the ICANN Board adopted was not a finding that ICM had satisfied the sponsorship criteria set forth in the Request for Proposal.

By August 9, 2005, ICM's first draft of the proposed .XXX STLD registry agreement was posted on ICANN's website and submitted to the ICANN Board for approval. ICANN's next Board meeting was scheduled for August 16, 2005, at which time the ICANN Board had planned on discussing the proposed agreement.

Within days of ICANN posting the proposed registry agreement, the Government Advisory Committee (hereinafter "GAC") Chairman wrote Dr. Cerf a letter expressing the GAC's diverse and wide ranging" concerns with the .XXX STLD and requesting that the ICANN Board provide additional time for governments to express their public policy concerns before the ICANN Board reached a final decision on the proposed registry agreement.

The GAC's input was significant and proper because the ICANN By-Laws require the ICANN Board to take into account advice from the GAC on public policy matters, both in formulation and adoption of policies. ICANN By-Laws Article XI, § 2.1 (j), provides: "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies." Where the ICANN Board seeks to take actions that are inconsistent with the GAC's advice, the Board must tell the GAC why. Thus, it was perfectly acceptable, appropriate and fully consistent with the ICANN Articles of Incorporation and By-Laws for the ICANN Board to consider and to address the GAC's concerns.

Further, throughout 2005 and up to the ICANN Board's denial of the ICM .XXX STLD on March 30, 2007, a number of additional continuing concerns and issues appeared beyond those originally voiced by the evaluation panel at the beginning of the review process. Despite the best efforts of many and

numerous opportunities, ICM could not satisfy these additional concerns and, most importantly, could not cure the continuing sponsorship defects.

In all respects, ICANN operated in a fair, transparent and reasoned manner in accordance with its Articles of Incorporation and By-Laws.

V

CONCLUSION

For the reasons stated above, I would give substantial deference to the actions of the ICANN Board of Directors taken on March 30, 2007, in approving a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. I specifically reject any notion that there was any sinister motive by any ICANN Director, governmental entity or religious organization to undermine ICM Registry, LLC's application. In my opinion, the application was rejected on the merits in an open and transparent forum. On the basis of that, ICM Registry, LLC never satisfied the sponsorship requirements and criteria for a top level domain name.

The rejection of the business judgment rule will open the floodgates to increased collateral attacks on the decisions of the ICANN Board of Directors and undermine its authority to provide a reliable point of reference to exercise plenary control over the Internet Domain Name System. In addition, it will leave the ICANN Board in a very vulnerable position for politicization of its activities.

The business judgment rule establishes a presumption that the directors' and officers' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the management in good faith and in the absence of a conflict of interest. *Katz v. Chevron Corp.*, 22 Cal.App.4th 1352. In most cases, "the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts." The record in this case does not support such findings. In addition, interference with the discretion of the directors is not warranted in doubtful cases such as is present here. *Lee v. Interinsurance Exch.*, 50 Cal.App.4th 694.

In *Marble v. Latchford Glass Co.*, 205 Cal.App.2nd 171, the court stated that it would "not substitute its judgment for the business judgment of the board of directors made in good faith." Similarly, in *Eldridge v. Tymshare, Inc.*, 186 Cal.App.3rd 767, the court stated that the business judgment rule "sets up a presumption that directors' decisions are based on sound business judgment. This presumption can be rebutted only by a factual showing of fraud, bad faith or gross overreaching." ICM Registry, LLC has not met the standard articulated by established law.

In the present case, regardless of how ICM Registry, LLC stylizes its allegations, the business judgment rule poses a substantial hurdle for ICM's effort which I submit was never met by the evidence presented. The evidence presented at the hearing held in this matter disclosed that at every step the decisions made by the ICANN Board were made in good faith, and for the benefit of the continued operation of ICANN in its role as exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System.

Simply stated, as long as ICANN is incorporated and domiciled within the State of California, U.S.A., it is the undersigned's opinion that the standard of review to be used by the Independent Review Panel in judging the conduct of the ICANN board, is the abuse of discretion standard, based upon the business judgment rule, and not a de novo review of the evidence.

JUDGE DICKRAN TEVRIZIAN (Retired)

Dickran Tevrian
February 18, 2010

3. Applicable Laws

A. Overview

a. Introduction

3.01 Many disputes that are referred to arbitration are determined by arbitral tribunals with no more than a passing reference to the law. They turn on matters of fact: what was said and what was not said; what was promised and what was not promised; what was done and what was not done. A plant for the manufacture of glass pharmaceutical bottles is erected and put into operation on a turnkey basis, but fails to produce bottles of the right quality and quantity and the plant operates at a loss. Was this because of some defect in the plant, for which the supplier is responsible; or was it due to mismanagement by the owner in the operation of the plant? A major bank is involved in a financial scandal and the bank's institutional shareholders agree to compensate depositors for their loss. Are these payments recoverable under a policy of insurance, or reinsurance, or are they not covered?

3.02 In such cases the arbitral tribunal first needs to resolve the issues of fact, as best it can, before moving on to interpret the contract and, if need be, to refer to any underlying system of law. Just as an arbitral tribunal frequently reaches its decision on the merits of a dispute without detailed reference to the law applicable to those merits, so an arbitral tribunal may well pay little or no attention to the law that governs its own existence and proceedings as an arbitral tribunal. Indeed, it may not even give more than fleeting recognition to the fact that such a law exists—any [page "163"](#) more than the average purchaser of a motor car gives at best fleeting recognition to the law of contract that underpins the transaction.

b. No legal vacuum

3.03 It would be wrong to deduce from this, however, that international commercial arbitration exists in a legal vacuum. That would be like suggesting that there is no need for a law of contract, since parties to a contract make their own law. Millions of contracts, most of them made orally rather than in writing, are made every day throughout the world. They may be as simple as the purchase of a bus ticket or the hire of a taxi, or they may be as complex as the purchase of a car on credit terms. Most are made, performed—and forgotten. Disputes are rare, the involvement of lawyers rarer still. Yet law governs each of these situations. The apparent simplicity of the purchase of a bus ticket or the hire of a taxi is deceptive. They are transactions that involve a contractual relationship and such relationships are underpinned by complex rules of law. These may not be referred to expressly, but they exist nonetheless:

It is often said that the parties to a contract make their own law, and it is, of course, true that, subject to the rules of public policy and *ordre public*, the parties are free to agree upon such terms as they may choose. Nevertheless, agreements that are intended to have a legal operation (as opposed to a merely social operation) create legal rights and duties, and legal rights and duties cannot exist in a vacuum but must have a place within a legal system which is available for dealing with such questions as the validity, application and interpretation of contracts, and, generally, for supplementing their express provisions.⁽¹⁾

3.04 Like a contract, an arbitration does not exist in a legal vacuum. It is regulated first by the rules of procedure that have been agreed or adopted by the parties and the arbitral tribunal. Secondly, it is regulated by the law of the place of arbitration. It is important to recognise at the outset—as even distinguished judges and commentators sometimes fail to do—that this dualism exists.

3.05 For the most part, modern laws of arbitration are content to leave parties and arbitrators free to decide upon their own particular, detailed rules of procedure, so long as the parties are treated equally. Under these modern laws, it is accepted that the courts of law should be slow to intervene in an arbitration, if they intervene at all.⁽²⁾ Nevertheless, rules need the sanction of law if they are to be

Topics

› Investment Arbitration

Source

› **3. Applicable Laws** in Alan Redfern, J. Martin Hunter, et al., Redfern and Hunter on International Arbitration (Fifth Edition), 5th edition (© Nigel Blackaby, Martin Hunter, Constantine Partasides, Alan Redfern; Oxford University Press 2009) pp. 163 - 239

effective; and in [page "164"](#) this context the relevant law is the law of the place or seat of the arbitration. This is occasionally referred to as the 'curial law', generally by English lawyers, but is much more commonly known as the '*lex arbitri*'.

3.06 This is an important—and frequently misunderstood—topic, to which it will be necessary to return later in this chapter.

c. A complex interaction of laws

3.07 International commercial arbitration, unlike its domestic counterpart, usually involves more than one system of law or of legal rules. Indeed it is possible, without undue sophistication, to identify at least five different systems of law which in practice may have a bearing on an international commercial arbitration. These are:

- (i) the law governing the arbitration agreement and the performance of that agreement;
- (ii) the law governing the existence and proceedings of the arbitral tribunal—the *lex arbitri*;
- (iii) the law, or the relevant legal rules, governing the substantive issues in dispute—generally described as the 'applicable law', the 'governing law', 'the proper law of the contract', or 'the substantive law';
- (iv) other applicable rules and non-binding guidelines and recommendations;⁽³⁾ and
- (v) the law governing recognition and enforcement of the award (which may, in practice, prove to be not one law, but two or more, if recognition and enforcement is sought in more than one country in which the losing party has, or is thought to have, assets).⁽⁴⁾

3.08 This chapter deals with the law governing the agreement to arbitrate; the law governing the arbitration itself (the *lex arbitri*); the law governing the substantive matters in dispute (the substantive law); the law or rules governing conflicts of law; and certain non-national guidelines and rules that are increasingly relied upon in international arbitration. The law governing the parties' capacity to enter into an arbitration agreement has been dealt with in Chapter 2; and issues relating [page "165"](#) to the laws governing the arbitral award (including challenge, recognition, and enforcement) are dealt with in Chapters 10 and 11.

B. The Law Governing the Agreement to Arbitrate

3.09 An agreement to arbitrate, as discussed in Chapter 2, may be set out in a purpose-made submission agreement or, much more frequently, in an arbitration clause. Both submission agreements and arbitration clauses have been considered in detail in the previous chapter. It is appropriate, however, to consider the law governing arbitration agreements here.

3.10 It might be assumed that this is the same law as that which the parties had chosen to govern the substantive issues in dispute. But this is not necessarily a safe assumption.⁽⁵⁾ The applicable law clause set out above refers expressly to the 'substantive issues in dispute'. It does not refer in terms to disputes that might arise in relation to the submission agreement itself, and it would be sensible, in drafting a submission agreement, to make clear what law is to apply to that agreement.

3.11 If no such express designation has been made, and it becomes necessary to determine the law applicable to the agreement to arbitrate, what are the choices?⁽⁶⁾ There are other possibilities, but the principal choice—in the absence of any express or implied choice by the parties—appears to be between the law of the seat of the arbitration and the law which governs the contract as a whole.

a. Law of the contract

3.12 Since the arbitration clause is only one of many clauses in a contract, it might seem reasonable to assume that the law chosen by the parties to govern the contract will [page "166"](#) also govern the arbitration clause.⁽⁷⁾ If the parties expressly choose a particular law to govern their agreement, why should some other law—which the parties have not chosen—be applied to but one of the clauses in the agreement, simply because it happens to be the arbitration clause? It seems reasonable to say, as Professor Lew has said:

There is a very strong presumption in favour of the law governing the substantive agreement which contains

the arbitration clause also governing the arbitration agreement. This principle has been followed in many cases. This could even be *implied* as an agreement of the parties as to the law applicable to the arbitration clause.⁽⁸⁾

3.13 A distinguished French commentator has offered a similar view:

The autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any other formality.⁽⁹⁾

This supports the view that the arbitration clause is generally governed by the same law as the rest of the contract. However, the reference to the 'autonomy' of the arbitration clause, in this citation, points to the problem that may arise. An arbitration clause is taken to be autonomous and to be separable from other clauses in the agreement.⁽¹⁰⁾ If necessary, it may stand alone. In this respect, it is comparable to a submission agreement. It is this separability of an arbitration clause that opens the way to the possibility that it may be governed by a different law from that which governs the main agreement.

3.14 The New York Convention points towards this conclusion.⁽¹¹⁾ In the provisions relating to enforcement, the Convention stipulates that the agreement under which the award is made must be valid 'under the law to which the parties have  page "167" subjected it', or, failing any indication thereon, 'under the law of the country where the award was made' (which will be the law of the seat of the arbitration).

b. Law of the seat of the arbitration

3.15 Taking as their point of departure the separability of the arbitration clause, there are a number of cases, in different jurisdictions, in which a court or arbitral tribunal has taken the law of the seat of the arbitration as the appropriate law to govern the parties' arbitration agreement. The following examples illustrate this.

3.16 In *C v D*⁽¹²⁾ the English Court of Appeal ruled that English law was the governing law of an arbitration agreement even though it appeared in a contract governed by New York law. The case concerned a Bermuda form insurance contract which provided that all disputes arising under the policy would be finally resolved in London under the 1996 English Arbitration Act, albeit that the underlying contract of insurance was expressed to be governed by New York law.

3.17 On 2 May 2005, C initiated arbitration against D in London seeking recovery of monies paid under the insurance policy in excess of the policy limits. The tribunal issued a partial award on 13 March 2007, which was substantially in C's favour. D intimated its intention to apply to the US federal courts to vacate the award, which it claimed displayed a manifest disregard for New York law. C applied to the English High Court for, and obtained, an anti-suit injunction to restrain D from doing so.

3.18 The English Court of Appeal upheld the anti-suit injunction granted by the lower court on the basis that London was the seat of the arbitration and so the parties had agreed that any challenge to an interim or final award would only be on the basis of English law, before the English Courts, and not New York law as argued by D.

3.19 Since the case turned on the applicability of the law of the seat (which in itself was undisputed), it was not actually necessary for the Court of Appeal to rule on the matter of the law applicable to the arbitration agreement. It did, however, go on to decide that the arbitration agreement should be presumed to be governed by the law of the seat, which usually coincides with the place with which the agreement to arbitrate (as opposed to the underlying contract as a whole) has 'the closest and most real connection'. The Court went on to proffer that 'an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause'.⁽¹³⁾

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3.20 In support of its observations, both the court at first instance and the Court of Appeal in confirming its decision cited previous judgments of the English courts:

- (i) The court at first instance cited the decision in *XL Insurance Ltd v Owens Corning* (another case in which English law was applied to an insurance policy containing a New York applicable law clause and a London arbitration clause, with specific reference to the Arbitration Act 1996).⁽¹⁴⁾
- (ii) The court held that by providing for arbitration in London under the auspices of the Arbitration Act 1996, the parties had chosen English law to govern the matters falling within its provisions. These included not only those matters arising under the Act, but also issues concerning the formal validity of the arbitration clause and the jurisdiction of the arbitral tribunal. This decision was (unsurprisingly) followed by the same court's decision in *Noble Assurance Company and Shell Petroleum Inc v Gerling Konzern General Insurance Company UK Branch*.⁽¹⁵⁾ In the latter case it was held that notwithstanding that the choice of governing law was New York law, the fact that the parties had agreed to refer disputes to arbitration in England under the auspices of the English Arbitration Act 1996, meant that the arbitration agreement was governed by English law.
- (iii) The English Court of Appeal referred to the ruling in *Black-Clawson v Papierwerke* that 'it would be a rare case in which the law of the arbitration agreement was not the same as the law of the place or seat of the arbitration'.⁽¹⁶⁾

This position is therefore fairly well-settled in English law and so parties arbitrating in England, who intend the arbitration agreement to be governed by the same law as the law governing the underlying contract rather than the law of the seat, would be well advised to include an express provision to that effect.

3.21 In the *Bulbank* case, the Bulgarian Foreign Trade Bank (Bulbank) concluded a contract with an Austrian bank.⁽¹⁷⁾ The contract containing the arbitration clause expressed a choice of Austrian law. A dispute arose between the two parties, and arbitral proceedings were initiated in Stockholm. The award was challenged by Bulbank in the Swedish courts on the basis that the arbitration agreement was void for breach of an allegedly implied term of confidentiality. The Supreme Court of Sweden held that the arbitration agreement was valid under the law of the seat of arbitration, Swedish law, stating:

... no particular provision concerning the applicable law for the arbitration agreement itself was indicated [by the parties]. In such circumstances the issue of the validity of the arbitration clause should be determined in accordance with the law of the state in which the arbitration proceedings have taken place, that is to say, Swedish law.

The Supreme Court thus ignored the parties' choice of Austrian law to govern the underlying contract, considering that the arbitration clause ought to be treated as a separate agreement subject to a separate law.

3.22 In a Belgian case, *Maternaco v PPM Cranes*, the law of the place of arbitration, Belgium, was applied to questions of arbitrability, despite the fact that the laws of the State of Wisconsin had been chosen by the parties to apply to the underlying contract.⁽¹⁸⁾ The Brussels Tribunal de Commerce considered Articles II(1) and V(2)(a) of the New York Convention, stating that their similarity:

and a consistent interpretation of the Convention require that the arbitrable nature of the dispute be determined, under the said Articles II and V, under the same law, that is, the *lex fori*. Hence it is according to Belgian law that the arbitrable nature of the present dispute must be determined.

3.23 In all of these cases, it is plain that the effect of the decision (and perhaps one of the driving forces behind it) was to validate the arbitration agreement. The parties had agreed to arbitrate disputes, but when the time came to do so, one party sought to renege on that agreement.

3.24 The importance of the law of the seat of arbitration is particularly marked in the United States. The Federal Arbitration Act of 1925 (the FAA) controls arbitrations involving interstate or foreign commerce and maritime transactions; and it also implements the New York Convention. One commentator has written:

The FAA creates a body of federal substantive law of arbitrability and pre-empts contrary state law policies. Hence, once the dispute is covered by the FAA,

federal law applies to all questions of interpretation, construction, validity, revocability and enforceability.⁽¹⁹⁾

3.25 The scope of the FAA is therefore such that it appears of itself to constitute the law governing the arbitration agreement. This analysis is confirmed by recent US cases focusing on the relationship between the FAA and state (or even foreign) law, which emphasise the former's pre-eminence as the law governing the arbitration  page "170" even where there is an express choice of state (or foreign law) in relation to the arbitration clause or agreement itself.

3.26 In *Pedcor Mgt Co Inc Welfare Benefit Plan v N Am Indemnity*, which concerned a class arbitration, and where the arbitration agreement expressed a choice of Texan law, the court stated:

it is well established that the FAA pre-empts state laws that contradict the purpose of the FAA by 'requiring a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration'.⁽²⁰⁾

3.27 In *Milos Sovak v Chugai Pharmaceutical Co* there was a motion to vacate an arbitration award on the grounds that the successful party had waived its right to compel arbitration under Illinois state law, which governed the arbitration provision. The US Court of Appeals for the Ninth Circuit stated:

the strong default presumption is that the FAA, not state law, supplies the rules of arbitration ... a general choice of law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration ...⁽²¹⁾

3.28 In *Chloe Z Fishing v Odyssey Re*, the FAA was given pre-eminence even though the parties had chosen a foreign forum and foreign law (as opposed to a state forum and state law) to govern their disputes:⁽²²⁾

- (i) the plaintiffs, US commercial fishing companies, purchased marine insurance coverage from Odyssey Re. The policies contained an arbitration clause providing for arbitration of disputes in London under English law. A dispute arose between the parties as to the handling of claims by Odyssey Re, and the plaintiffs filed an action in a Californian court. Odyssey Re removed the action to the US District Court for the Southern District of California and filed a motion to compel arbitration and stay the proceedings;
- (ii) the court referred the parties to arbitration in London and stayed court proceedings, holding that the arbitral clause in the policies constituted a valid arbitration agreement under the New York Convention and the FAA. It held that, despite the English choice of law (and forum), where the New York Convention and the FAA applied to an arbitration clause:

... they provide an 'overriding basis' for why the law under which the case 'arises'—the Convention and its implementing legislation—must apply to the question of whether these parties agreed to arbitrate their disputes ... once a dispute is covered by the [Federal Arbitration] Act, federal law applies to all questions of [the arbitration agreement's] interpretation, construction, validity, revocability and enforceability.⁽²³⁾

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3.29 The court's conclusion was that notwithstanding its request for supplemental briefing on the parties' intent to be bound by English law, the choice of law provision in the policies, and the express provision for arbitration in London, federal law applied to the court's preliminary inquiry as to the scope of the arbitration clauses.

c. The parties' common intention: the French third way

3.30 The solutions considered so far have focused on establishing the law governing the arbitration agreement by reference to a national law: be it the law of the contract or the law of the seat of arbitration. The French courts, however, have adopted a different method whereby the existence and scope of the arbitration agreement is determined exclusively by reference to the parties' discernible common intentions. In this way, the arbitration agreement remains independent of the various national laws which

might, in other jurisdictions, be deemed to apply to it. This approach avoids the difficulties of categorising the arbitration agreement for conflict of laws purposes, as well as the particularities of private international law regimes.

3.31 This French third way came about as a result of a number of decisions by the Paris Cour d'Appel from the early 1970s through to the early 1990s that culminated in the Cour de cassation's decision in *Dalico* in 1993:

by virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.⁽²⁴⁾

References in this context to the independence of the arbitration agreement are to its autonomy from the national laws which otherwise might apply to it as opposed to autonomy from the main contract in terms of its existence.⁽²⁵⁾

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3.32 The French Supreme Court thus stopped short of a complete delocalisation of the arbitration agreement, by subjecting it to the mandatory provisions of French law.⁽²⁶⁾ Moreover, it does remain open to the parties, if such is their common intention, expressly to designate a national legal system or set of conflict laws, as the French Supreme Court clarified in the *Uni-Kod* decision.⁽²⁷⁾

d. Combining several approaches: the Swiss model

3.33 The final approach in determining the law or rules applicable to an arbitration agreement is to combine several approaches, as is the case in Switzerland. Article 178(2) of the Swiss Federal Statute of Private International Law provides:

As regards its substance, the arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law.

This formulation allows Swiss courts maximum opportunity to uphold the validity of the arbitration agreement.

C. The Law Governing the Arbitration

a. Introduction

3.34 An international commercial arbitration usually takes place in a country that is 'neutral', in the sense that none of the parties to the arbitration has a place of business or residence there.⁽²⁸⁾ This means that in practice the law of the country in whose territory the arbitration takes place, the *lex arbitri*, will generally be different from the law that governs the substantive matters in dispute. An arbitral tribunal with its seat in the Netherlands, for example, may be required to decide the substantive issues in dispute between the parties in accordance with the law of Switzerland or the law of the State of New York or some other law, as the case may be.  [page "173"](#) Nevertheless, the arbitration itself, and the way in which it is conducted, will be governed (if only in outline) by the relevant Dutch law on international arbitration.

3.35 This difference between the *lex arbitri* (the law of the place or 'seat' of the arbitration) and the law governing the substance of the dispute, was part of the juridical tradition of continental Europe, but is now firmly established in international commercial arbitration.⁽²⁹⁾

3.36 It is right that there should be a distinction between the *lex arbitri* and the substantive law of the contract. Where parties to an international arbitration agreement choose for themselves a seat of arbitration, they usually choose a place that has no connection with either themselves or their commercial relationship. They choose a 'neutral' place.⁽³⁰⁾ By doing so, they do not necessarily intend to choose the law of that place to govern their relationship.⁽³¹⁾ Indeed, as well as choosing a place of arbitration, they may well choose a

substantive law that has no connection with that place.

3.37 If the parties do not make an express choice of the place of arbitration, the choice will have to be made for them, either by the arbitral tribunal itself or by a designated arbitral institution. The UNCITRAL Rules, for instance, state:

Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.⁽³²⁾

The ICC Rules leave the choice to the ICC Court:

The place of arbitration shall be fixed by the Court unless agreed upon by the parties.⁽³³⁾

If the ICC is called upon to choose a place of arbitration under this provision of the Rules, it generally selects the country of the sole or presiding arbitrator. As the arbitrator is usually of a different nationality from that of the parties,⁽³⁴⁾ the ICC does its best to ensure that the country chosen is one which favours arbitration.

3.38 In cases of this kind, which are not uncommon both in institutional and in *ad hoc* arbitration, the choice of the place of arbitration has little or nothing to do with the parties or with the contract under which the dispute arises. It is, so to speak, [page "174"](#) an unconnected choice. In these circumstances, it would be illogical to hold that the *lex arbitri*, the law of the place of arbitration, was necessarily the law applicable to the issues in dispute. (Occasionally, it may be otherwise if the parties have chosen a place of arbitration but not chosen a law to govern their contractual relationship.)⁽³⁵⁾

b. What is the *lex arbitri*?

3.39 It is appropriate, at this stage, to consider what is meant by the *lex arbitri*. The question was posed rhetorically by a distinguished English judge:

What then is the law governing the arbitration? It is, as the present authors trenchantly explain,⁽³⁶⁾ a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (eg Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (eg filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (eg removing an arbitrator for misconduct).⁽³⁷⁾

c. The content of the *lex arbitri*

3.40 Each State will decide for itself what laws it wishes to lay down to govern the conduct of arbitrations within its own territory. Some States will wish to build an element of consumer protection into their law, so as to protect private individuals. For example, the Swedish Arbitration Act 1999 provides⁽³⁸⁾ that an arbitration agreement with a consumer involving goods or services for private use is invalid if made before a dispute arises. Again, for example, the Swedish Act provides that the arbitral tribunal must set out in its award its decision as to the fees payable to each of the arbitrators;⁽³⁹⁾ and the arbitral tribunal must notify the parties of the steps that may be taken to appeal to the district court against this decision.⁽⁴⁰⁾

3.41 In recognition of the distinction between domestic arbitration and international arbitration—where the sums at issue are likely to be larger and the parties are [page "175"](#) judged better able to look after themselves—some States have (sensibly, it may be thought) introduced a code of law specifically designed for international arbitrations. Such a code of law is usually fairly short—the Swiss Code, for example, contains only 23 articles,⁽⁴¹⁾ some of which consist of a single sentence, and the French Code, containing only 16 articles, is even more concise.⁽⁴²⁾ Indeed, some States (such as Colombia) have enacted short laws which simply define the concept of international arbitration and clarify that such arbitrations

are to be governed by the international treaties signed by that State rather than by codes applicable to domestic arbitration.⁽⁴³⁾

3.42 Reference has already been made to the Model Law, which the authors have described as the baseline for any State wishing to modernise its law of arbitration.⁽⁴⁴⁾ Although the Model Law contains more provisions than those to be found in the comparable Swiss or French laws, these provisions are drawn in relatively broad terms. They do not purport to lay down any detailed procedural rules as to the actual conduct of an arbitration—such rules, for example, as the submission and exchange of witness statements, the order in which witnesses are to be called, the time to be allotted for the questioning and cross-questioning of witnesses and so forth. Indeed, the Model Law expressly provides that:

- (i) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (ii) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.⁽⁴⁵⁾

3.43 It may be helpful at this point to give examples of the matters with which the *lex arbitri* might be expected to deal, although the exact position under the relevant *lex arbitri* should be checked, particularly where these legal provisions are mandatory. With this qualification, the *lex arbitri* is likely to extend to:

- the definition and form of an agreement to arbitrate;
- whether a dispute is capable of being referred to arbitration (that is to say, whether it is 'arbitrable' under the *lex arbitri*); [page "176"](#)
- the constitution of the arbitral tribunal and any grounds for challenge of that tribunal;
- the entitlement of the arbitral tribunal to rule on its own jurisdiction;
- equal treatment of the parties;
- freedom to agree upon detailed rules of procedure;
- interim measures of protection;
- statements of claim and defence;
- hearings;
- default proceedings;
- court assistance if required;
- the powers of the arbitrators, including any powers to decide as '*amicales compositeurs*';
- the form and validity of the arbitration award; and the finality of the award, including any right to challenge it in the courts of the place of arbitration.

These are all important aspects of international arbitration. They may well arise in practice and are all addressed later in this commentary. Three essential points should be made now.

- (i) The effective conduct of an international arbitration may depend upon the provisions of the law of the place of arbitration. One way of illustrating this dependence is by reference to any provisions of the local law for judicial assistance in the conduct of the arbitration. Even if the arbitrators have the power to order interim measures of protection, such as orders for the preservation and inspection of property, they are unlikely to have the power to enforce such orders—particularly if the property in question is in the possession of a third party. For this, it is necessary to turn to national courts for assistance.⁽⁴⁶⁾
- (ii) The choice of a particular place of arbitration may have important and unintended consequences. This is because the law of that place may confer [page "177"](#) powers on the courts or on the arbitrators that were not expected by the parties. An example of this is the power to consolidate arbitrations. Whether or not a court or arbitral tribunal has the power to consolidate two or more arbitrations that involve the same basic issues of fact or law is a controversial question. In the present context, it is only necessary to note that such a power may exist under the *lex arbitri*; and this may come as a disagreeable surprise to a party who does not wish to have other parties joined in its arbitration.⁽⁴⁷⁾

(iii) There is an obvious prospect of conflict between the *lex arbitri* and a different system of law that may be equally relevant. Consider, for example, the question of arbitrability, that is to say, whether or not the subject-matter of the dispute is 'capable' of being resolved by arbitration. The concept of arbitrability is basic to the arbitral process. Both the New York Convention and the Model Law refer explicitly to disputes that are 'capable of being resolved by arbitration'.

3.44 It may be said that, if a dispute is capable of being resolved by litigation in the courts, which will lead to a decision that (subject to any appeal) puts an end to that dispute, surely the same dispute is equally capable of being resolved by arbitration? Theoretically, this may well be correct. In practice, however, as discussed in more detail in Chapter 2,⁽⁴⁸⁾ every State reserves for itself, as a matter of public policy, what might perhaps be called a 'State monopoly' over certain types of dispute. Accordingly, whether or not a particular dispute—for instance, over the disposal of assets belonging to a bankrupt company—is legally 'capable of being resolved by arbitration' is a matter which each State will decide for itself. It is a matter on which States may well differ, with some taking a more restrictive attitude than others. This obviously results in an element of forum shopping and is 'good for business' for those jurisdictions adopting a liberal approach to arbitrability; for example, due to their liberal approach to arbitrating intellectual property disputes, Geneva or London might be preferred over Paris as the seat chosen for an arbitration of a trade mark dispute. However, a claim may be arbitrable under the law governing the arbitration agreement and under the *lex arbitri* but not under the law of the place of enforcement. An award in such a case, although validly made under the *lex arbitri*, might prove to be unenforceable under the New York Convention.

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d. Procedural rules and the *lex arbitri*

3.45 The preceding discussion about the content of the *lex arbitri* indicates that most, if not all, national laws governing arbitration deal with general propositions, such as the need to treat each party equally, rather than with detailed rules of procedure, such as the time for exchange of witness statements or the submission of pre-hearing briefs.

3.46 Nevertheless, at some stage in the conduct of an arbitration—and indeed, at a fairly early stage—the parties will need to know where they stand in terms of the detailed procedure to be followed. There are many points to be clarified. For example, will the claimant's statement of claim simply outline the facts supporting the claim or will it be accompanied by the documents that are relied upon and perhaps by legal submissions? When the respondent has submitted its defence, will the claimant have the right to put in a reply or is that the end of the written submissions? What about the evidence of witnesses? Are there to be written statements of witnesses and, if so, in what order, within what time limits, and with what (if any) right of reply?

3.47 It is plainly necessary for the parties and the arbitral tribunal to know what procedural rules they are required to follow, particularly in an international arbitration where the parties will usually come from different backgrounds, with a different approach to such questions as the interviewing of witnesses, the disclosure of documents, and so forth.

3.48 All that needs to be understood at this point is that there is a great difference between the general provisions of the law governing the arbitration (the *lex arbitri*) and the detailed procedural rules that will need to be adopted, or adapted, for the fair and efficient conduct of the proceedings. The rules of the arbitral institutions, such as the ICC and the LCIA, provide an overall framework within which to operate, as do the UNCITRAL Rules. However, it is important to note that even these rules will need to be supplemented by more detailed provisions by the parties or the arbitral tribunal, as discussed in Chapter 6.

3.49 It is therefore often advisable, particularly where parties and their counsel are from different legal backgrounds, to agree such rules at the outset of an arbitration. This may be done by agreement of the parties, or by order of the arbitral tribunal at the first procedural meeting. As part of this process, the parties may agree, or the arbitral tribunal may order, that they adopt or have regard to a preexisting set of detailed rules—for instance the International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration. By ensuring that the rules are clearly established early on, the administration of the case will (or at least

should) be simplified and the scope for delay and dilatory tactics reduced.

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3.50 It is sometimes suggested that parties to an arbitration are free to choose between the law governing the arbitration (the *lex arbitri*) and a set of procedural rules. Thus, having stated (correctly, it may be thought) that by comparing various institutional rules such as those of UNCITRAL, the LCIA, and the ICC, 'a core of "international" procedural rules may emerge', one commentator goes on to say:

For present purposes, the key point is simply that the procedural law of an international arbitration is not necessarily governed by the *lex loci arbitri* but may be regulated by another system of rules chosen or designed by the parties or, in the absence of choice, by the arbitrators.⁽⁴⁹⁾

This cannot be right. The *procedure* of an arbitration may be, and generally is, regulated by the rules chosen by the parties; but the procedural *law* is that of the place of arbitration and, to the extent that it contains mandatory provisions, is binding on the parties whether they like it or not. It may well be that the *lex arbitri* will govern with a very free rein, but it will govern nonetheless. The only exception is the particular case of arbitration between investors and States under the International Centre for Settlement of Investment Disputes (ICSID) Convention, which is almost entirely insulated from the place of arbitration. Interim measures may only be sought from the tribunal itself (unless there is an express agreement otherwise) and any review of the award is the exclusive domain of an *ad hoc* committee appointed by the institution itself rather than the courts of the place of arbitration (see Chapter 8).⁽⁵⁰⁾

e. The seat theory

3.51 The concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' (or 'forum' or '*locus arbitri*') of the arbitration, is well established in both the theory and practice of international arbitration.⁽⁵¹⁾ It has influenced the wording of international conventions from the 1923 Geneva Protocol to the New York Convention. The 1923 Geneva Protocol states:

The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed *by the will of the parties and by the law of the country* in whose territory the arbitration takes place.⁽⁵²⁾

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3.52 The New York Convention⁽⁵³⁾ maintains the reference to 'the law of the country where the arbitration took place'⁽⁵⁴⁾ and, synonymously, to 'the law of the country where the award is made'.⁽⁵⁵⁾ This continues the clear territorial link between the place of arbitration and the law governing that arbitration, the *lex arbitri*. This territorial link is again maintained in the Model Law:

The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.⁽⁵⁶⁾

3.53 Amongst modern laws on arbitration, those of Switzerland and of England are perhaps particularly clear on the link between the seat of the arbitration and the *lex arbitri*. Swiss law states:

The provisions of this chapter shall apply to any arbitration *if the seat of the arbitral tribunal is in Switzerland* and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.⁽⁵⁷⁾

In English law, certain provisions of the 1996 Act apply only where the seat of the arbitration is in England, Wales, or Northern Ireland, whereas other provisions (for instance, for the stay of court proceedings commenced in breach of an arbitration agreement) apply even if the seat of the arbitration is not in those countries or if no seat has been designated.⁽⁵⁸⁾ The 'seat of the arbitration' is defined as 'the juridical seat of the arbitration' designated by the parties, or by an arbitral institution or the arbitrators themselves, as the case may be.⁽⁵⁹⁾ Unless the parties agree otherwise, the seat of the arbitration must be stated in the award of the arbitrators.⁽⁶⁰⁾

3.54 As this introduction tries to make clear, the place or seat of the arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated:

When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that [page "181"](#) arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.⁽⁶¹⁾

The seat of an arbitration is thus intended to be its centre of gravity. This does not mean that all the proceedings of the arbitration have to take place there, although preferably some should do so:

Although the choice of a 'seat' also indicates the geographical place for the arbitration, this does not mean that the parties have limited themselves to that place. As is pointed out⁽⁶²⁾ in a passage approved by the Court of Appeal in *Naviera Amazonia Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 at 121, it may often be convenient to hold meetings or even hearings in other countries. This does not mean that the 'seat' of the arbitration changes with each change of country. The legal place of the arbitration remains the same even if the physical place changes from time to time, unless of course the parties agree to change it.⁽⁶³⁾

3.55 Arbitrators and the parties to an international commercial arbitration often come from different countries. It may not always be convenient for everyone concerned to travel to the country which is the seat of the arbitration for the purpose of a meeting or a hearing. Or it may simply be easier and less expensive to meet elsewhere. In recognition of this reality, the ICC Rules were amended to allow hearings and meetings to be held other than at the place (or seat) of the arbitration. The relevant rule reads as follows:⁽⁶⁴⁾

- (i) The place of the arbitration shall be fixed by the Court unless agreed upon by the parties.
- (ii) The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate unless otherwise agreed by the parties.
- (iii) The Arbitral Tribunal may deliberate at any location it considers appropriate.⁽⁶⁵⁾

3.56 The LCIA has a similar rule:⁽⁶⁶⁾

The Arbitral Tribunal may hold hearings, meetings and deliberations at any convenient geographical place in its discretion; and if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of [page "182"](#) the arbitration and any award as an award made at the seat of the arbitration for all purposes.⁽⁶⁷⁾

The Model Law also allows the arbitral tribunal to meet at any place it considers appropriate for its deliberations or to hear witnesses, unless the parties object.⁽⁶⁸⁾

3.57 These are sensible provisions. They recognise the realities of international commercial arbitration, with parties, lawyers, and arbitrators likely to be based in different parts of the world. They give flexibility to the tribunal and to the parties in selecting a convenient location for procedural meetings, hearings, and deliberations. It may be, for example, that although the seat of the arbitration is Jakarta, an arbitral tribunal may find it convenient to meet to hold hearings in Singapore.⁽⁶⁹⁾ In international construction disputes it is often necessary for an arbitral tribunal sitting in one country to visit the site of the project in another country to carry out an inspection. Equally, it may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country or continent—for instance, for the purpose of taking evidence.

3.58 An arbitral tribunal which visits another country must, of

course, respect the law of that country. For example, if the purpose of the visit is to take evidence from witnesses, the arbitral tribunal should respect any provisions of the local law that govern the taking of evidence.⁽⁷⁰⁾ However, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.⁽⁷¹⁾

3.59 What is the legal position if, as sometimes happens, the arbitral tribunal—having consulted the parties and perhaps against the objection of one of them—holds all meetings, hearings, and deliberations in a place which is not the seat of the arbitration? To proceed in this manner reduces the seat of the arbitration to a legal fiction: a place of arbitration in which nothing takes place. In the light of the provisions set out above, and subject to any particular restrictions contained in the [page "183"](#) *lex arbitri* and the views of the parties,⁽⁷²⁾ this would seem to be permissible. It conforms with the letter, if not the spirit, of the law or the applicable rules.

f. Is the *lex arbitri* a procedural law?

3.60 In some countries, the law governing arbitration, including international arbitration, is part of the Code of Civil Procedure. This is so, for example, in France and in Germany; and it is sometimes said that the *lex arbitri* is a law of procedure, as if that is all that it is. It is true, of course, that the *lex arbitri* may deal with procedural matters—such as the constitution of an arbitral tribunal where there is no relevant contractual provision—but the authors suggest that the *lex arbitri* is much more than a purely procedural law. It may stipulate that a given type of dispute—over patent rights, for instance, or (as in Belgium and some Arab States) over a local agency agreement—is not capable of settlement by arbitration under the local law. This is surely not simply a matter of procedure.⁽⁷³⁾ Or again, by way of example, an award may be set aside on the basis that it is contrary to the public policy of the *lex arbitri*. Once more, this would not seem to be merely a matter of procedure.

3.61 It is also sometimes said that parties have selected the procedural law that will govern their arbitration, by providing for arbitration in a particular country.⁽⁷⁴⁾ This is too elliptical and, as an English court itself held more recently in *Braes of Doune Wind Farm*,⁽⁷⁵⁾ it does not always hold true. What the parties have done is to [page "184"](#) choose a place of arbitration in a particular country. That choice brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration. To say that the parties have 'chosen' that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has 'chosen' French traffic law, which will oblige her to drive on the right-hand side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say that this notional motorist had opted for 'French traffic law'. What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice.

3.62 Parties may well choose a particular place of arbitration precisely because its *lex arbitri* is one which they find attractive.⁽⁷⁶⁾ Nevertheless, once a place of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory so far as arbitrations are concerned, those provisions must be obeyed.⁽⁷⁷⁾ It is not a matter of choice, any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard.

g. Choice of a foreign procedural law

3.63 The concept of subjecting an arbitration in one State to the procedural law of another has been the subject of much theoretical discussion. Thus, for example, an arbitration could be held in Switzerland but, by agreement between the parties, made subject to the procedural law of Germany. In this regard, Swiss law provides that the parties to an arbitration may 'subject the arbitral procedure to the procedural law of their choice'.⁽⁷⁸⁾

3.64 It is not easy to understand why parties might wish to complicate the conduct of an arbitration in this way (unless, as is possible, they do not understand what they are doing). It means that the parties and the arbitral tribunal would need to have regard to two procedural laws: that of Germany, as the chosen procedural law, and that of Switzerland, to the extent that the provisions of Swiss law (such as the requirement of equality of treatment of the parties) are mandatory.⁽⁷⁹⁾ Nor is this all. If it becomes necessary during the

course of the arbitration to have recourse to the courts—for example, on a challenge of one of the arbitrators—to which court would the complainant go? The Swiss court would presumably be reluctant to [page "185"](#) give a ruling on German procedural law; the German court might well prove unwilling to give a ruling on a procedural matter which it could not directly enforce, since the arbitration was not within its territorial jurisdiction.

3.65 It is tempting to suggest that if the procedural law of a particular country is either so attractive or so familiar to the parties that they wish to adopt it, they would do better to locate their arbitration in that country. It is only necessary to look at the difficulties that a party would face in obtaining a *subpoena* against a reluctant witness to realise the problems inherent in a choice of foreign procedural law.⁽⁸⁰⁾

3.66 In the *Peruvian Insurance* case,⁽⁸¹⁾ the English Court of Appeal considered a contract that had been held by the court of first instance to provide for an arbitration to be located in Peru but subject to English procedural law. The Court of Appeal construed the contract as providing for arbitration in London under English law but noted that a situation (such as that contemplated by the Florida International Arbitration Act) involving a choice of foreign procedural law was theoretically possible. However, practical difficulties were foreseen:

There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y. The limits and implications of any such agreement have been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences which such an agreement would involve. Thus, at any rate under the principles of English law, which rest upon the territorially limited jurisdiction of our courts, an agreement to arbitrate in X subject to English procedural law would not empower our courts to exercise jurisdiction over the arbitration in X.⁽⁸²⁾

h. Where an award is made

3.67 From time to time, it may become necessary to determine where an award is made. The point is an important one. For example, recognition and enforcement of an award may be refused on the basis that the arbitration agreement was not valid 'under the law of the country where the award was made';⁽⁸³⁾ or on the basis [page "186"](#) that the award itself had been 'set aside or suspended' by a court of the country in which it was made.⁽⁸⁴⁾

3.68 Some arbitration rules and some national laws deal expressly with the place at which an award is 'made'. For example, the ICC Rules provide that an award is deemed to be made at the place (or seat) of the arbitration and on the date stated therein.⁽⁸⁵⁾ This is a sensible provision when arbitrators who live in different countries may well have agreed on the final terms of the award by telephone, fax, or email. The Model Law contains a similar provision,⁽⁸⁶⁾ as does, for instance, the Netherlands 1986 Act⁽⁸⁷⁾ and the English Arbitration Act 1996.⁽⁸⁸⁾

3.69 But what happens when there is no provision in the rules of arbitration or in the *lex arbitri* as to where the award is made? Is this then a question of fact or is there some relevant legal presumption? In an international commercial arbitration, with a tribunal of three arbitrators, the award in its final form may well be signed in three different countries, each member of the tribunal adding his or her signature in turn. There is a strong argument that, in such circumstances, the award should be deemed to have been made at the seat of the arbitration:

The award, it is submitted, is no more than a part, the final and vital part of a procedure which must have a territorial, central point or seat. It would be very odd if, possibly without the knowledge of the parties or even unwittingly, the arbitrators had the power to sever that part from the preceding procedure and thus give a totally different character to the whole.⁽⁸⁹⁾

This analysis is persuasive, but it does assume, of course, that the 'central point or seat' was real, in the sense that the arbitral proceedings (or most of them) actually took place there.

3.70 An alternative view is that an award is 'made' at the place where it is signed. This was the view taken by the English court,⁽⁹⁰⁾ but the ruling was reversed by the 1996 Arbitration Act.⁽⁹¹⁾ Nevertheless, it is a view that may still prevail elsewhere in the world. The question is important and is discussed in more detail in Chapter 9.

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i. Delocalisation

3.71 So far as international commercial arbitration is concerned, it would save considerable time, trouble, and expense if the laws governing arbitrations were the same throughout the world, so that there was—so to speak—a universal *lex arbitri*. There would then be a 'level playing field' for the conduct of international commercial arbitrations wherever they took place. An arbitral tribunal would not have to enquire whether there were any special provisions governing arbitration which were peculiar to the law of the country which was the seat of the arbitration. On this aspect of the arbitral process, all laws would be the same.

3.72 In practice, however, the idea of a universal *lex arbitri* is as illusory as that of universal peace. Each State has its own national characteristics, its own interests to protect, and its own concepts of how arbitrations should be conducted in its territory. Although the Model Law offers States a simple, yet well-recognised approach to reaching a common standard for the practice of international commercial arbitration, certain States that have adopted the Model Law have been unable to resist adding their own particular provisions to it.⁽⁹²⁾ Also, States with a long history of arbitration and a highly developed law and practice are particularly unlikely to adopt simplified models, which may, in themselves, create fresh problems.⁽⁹³⁾ Nevertheless, it is inconvenient (to put it no higher) that the regulation of international commercial arbitration should differ from one country to another, and this has led to the search for an escape route.

3.73 In this connection, two separate developments are seen. The first is for the State to relax the control which it seeks to exercise over international commercial arbitrations conducted on its territory. This is the route taken by modern laws of arbitration. These laws take careful note of the theme of the Model Law, which is that their courts should not intervene in arbitrations, unless authorised to do so. The role of the courts should be supportive, not interventionist.⁽⁹⁴⁾

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3.74 The second development is to detach an international commercial arbitration from control by the law of the place in which it is held. This is the so-called 'delocalisation' theory, the idea being that instead of a dual system of control, first by the *lex arbitri* and then by the courts of the place of enforcement of the award, there should be only one point of control—that of the place of enforcement. In this way, the whole world (or most of it) would be available for international commercial arbitrations; and international commercial arbitration itself would be 'supra-national', 'a-national', 'transnational', 'delocalised', or even 'expatriate'. More poetically, such an arbitration would be a 'floating arbitration', resulting in a 'floating award'.⁽⁹⁵⁾

3.75 A recent judicial manifestation of the delocalisation theory is provided by the French Cour de cassation, which in enforcing an arbitral award set aside by the English High Court, held that:

an international arbitral award, *which does not belong to any state legal system*, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought.⁽⁹⁶⁾

The delocalisation theory takes as its starting point the autonomy of the parties—the fact that it is their agreement to arbitrate which brings the proceedings into being—and rests upon two basic (yet frequently confused) arguments.⁽⁹⁷⁾ The first assumes that international commercial arbitration is sufficiently regulated by its  page "189" own rules, which are either adopted by the parties (as an expression of their autonomy) or drawn up by the arbitral tribunal itself. The second assumes that control should only come from the law of the place of enforcement of the award.

i. The arguments considered

3.76 The first argument is, in effect, that an international commercial arbitration is self-regulating and that this is, or should be, sufficient. It is true that the parties to an international commercial arbitration will generally (but not always) have a set of procedural rules to follow, whether they are those of an arbitral institution or formulated *ad hoc*. It is also true that the arbitral tribunal will generally (but again not always) have the power to fill any gaps in these rules by giving procedural directions; and this set of rules, whether agreed by the parties or laid down by the arbitral tribunal, may perhaps be said to constitute ‘the law of the arbitration’, in the same way as a contract may be said to constitute ‘the law of the parties’. Finally, when the arbitration is being administered by an arbitral institution (such as the ICC or LCIA) that institution may be said to have taken over the State’s regulatory functions, by itself laying down rules for the confirmation or removal of arbitrators, terms of reference, time limits, scrutiny of awards, and so on.⁽⁹⁸⁾

3.77 Most arbitrations are conducted without any reference to the law that governs them. Nonetheless, to repeat a point that has already been made, this law—the *lex arbitri*—exists.⁽⁹⁹⁾ Its support may be needed not only to fill any gaps in the arbitral process (such as the appointment of arbitrators) but also to give the force of law to orders of the arbitral tribunal that reach beyond the parties themselves—for instance, for the ‘freezing’ of a bank account or for the detention of goods. More crucially, this law will confer its nationality on the award of the arbitral tribunal, so that it is recognised, for example, as a Swiss award or a Dutch award and may benefit from any international treaties (such as the New York Convention) to which its country of origin is a party.

3.78 The second argument in support of the delocalisation theory is that any control of the process of international commercial arbitration should come only at the place of enforcement of the award. If this were the position, it would mean that the place of arbitration was, in legal terms, irrelevant. This may or may not be a desirable solution; but it is significant that one State, Belgium, which had compulsorily ‘delocalised’ international arbitrations has—as described immediately below—now  [page "190"](#) changed its mind.⁽¹⁰⁰⁾ For the rest the prevailing emphasis, both nationally and internationally, is on a necessary connection between the place of arbitration and the law of that place. This may be seen, as has already been demonstrated, in the New York Convention⁽¹⁰¹⁾ and in the Model Law.⁽¹⁰²⁾

ii. The position in reality

3.79 The delocalisation theory has attracted powerful and eloquent advocates, but the reality is that the delocalisation of arbitrations (other than those, like ICSID, which are governed directly by international law) is only possible if the local law (the *lex arbitri*) permits it.

3.80 One country that opted in favour of a substantial degree of delocalisation was Belgium. By its law of 27 March 1985, a provision was added to Article 1717 of the Belgian Code Judiciaire which meant that a losing party was not permitted to challenge in the Belgian courts an award made in an international arbitration held in Belgium, unless at least one of the parties had a place of business or other connection with Belgium. However, it appears that this legal provision discouraged parties from choosing Belgium as the seat of the arbitration; and the law has since been changed.⁽¹⁰³⁾

j. The ‘seat’ theory and the *lex arbitri*

3.81 The strength of the seat theory is that it gives an established legal framework to an international commercial arbitration so that, instead of ‘floating in the transnational firmament, unconnected with any municipal system of law’,⁽¹⁰⁴⁾ the arbitration is firmly anchored in a given legal system. Just as the law of contracts helps to ensure that contracts are performed as they should be, and are not mere social engagements, so the *lex arbitri* helps to ensure that the arbitral process works as it should. The necessity for such support for (and control of) the arbitral process is, of course, reflected in the Model Law, which allows for certain functions (such as the appointment of arbitrators, where there is a vacancy) and for certain sanctions  [page "191"](#) (such as the setting aside of an award) to be exercised by the courts of the place of arbitration.⁽¹⁰⁵⁾

3.82 For this reason, the English courts have held that, although under English law, subject to certain mandatory provisions, parties are free to agree the law and procedure that will govern how proceedings are conducted, the law chosen must indeed satisfy this

function. In *Halpern v Halpern*, Jewish law was deemed not to be a 'realistic candidate as the law of the arbitration' and in addition was said to lack any supervisory or appellate jurisdiction over arbitrations.⁽¹⁰⁶⁾

3.83 The fact that different States have different laws governing international commercial arbitration and that some of these laws may not be well suited to this task has two practical consequences. First, it means that wherever an international commercial arbitration is held, the provisions of the local law should be checked to see whether there are any particular mandatory rules which must be observed in order to obtain a valid award. Secondly, it means that not every country is a suitable *situs* for international commercial arbitration; a certain amount of 'forum shopping' is advisable.

3.84 The first point is almost self-evident. For example, if the local law requires an award to be made within a defined period of time or to be lodged with a local court for it to be valid, then the necessary action must be taken to conform to this requirement. The second point is less evident, but equally important. Since the law and practice of international commercial arbitration differs from one State to the next (and may even differ from place to place within the same State), care should be taken to choose a place of arbitration in a State that is favourable rather than in one that is unfavourable. This is a matter of considerable practical importance, and should be considered at the time the parties are drafting their arbitration agreement.⁽¹⁰⁷⁾

3.85 One final comment is necessary before leaving the discussion of delocalisation and the *lex arbitri*. It seems for now that the movement in favour of total delocalisation, in the sense of freeing an international arbitration from control by the *lex arbitri*, has run into the ground. As the Belgian experiment showed, delocalisation is only possible to the extent that it is permitted by the *lex arbitri*; and parties to an arbitration may well prefer an arbitral tribunal which is subject to some legal control, rather than risk a runaway tribunal. However, there is still discontent amongst practitioners at the impact of local laws which are seen to operate unfairly  page "192" and, at times, almost arbitrarily and so there have been cases of what may perhaps be described as 'delocalisation by a side door'.

3.86 In *Chromalloy*, for example, the Egyptian court annulled an arbitral tribunal's award made in Cairo in favour of a US corporation. Despite this annulment by the courts of the place of arbitration, the award was granted recognition and enforcement by the US District Court in Washington, DC—'to the advantage of the home team' in the words of certain distinguished US commentators.⁽¹⁰⁸⁾ *Chromalloy* is only one example of national courts enforcing awards that have been annulled by the courts of the place of arbitration, and this is considered in greater detail in Chapter 11.

3.87 Then there are the problems caused by local courts which issue injunctions at the seat of the arbitration to prevent arbitral tribunals carrying out their task. Some tribunals continue with the arbitral proceedings despite the injunction (even when they are within the territorial jurisdiction of the court concerned) on the basis that the injunction is not justified.⁽¹⁰⁹⁾ In effect, these arbitrators 'delocalise' their arbitration by refusing to accept the rulings of the local court under the *lex arbitri*: again, this is discussed in more detail in Chapter 7.⁽¹¹⁰⁾

D. The Law Applicable to the Substance

a. Introduction

3.88 When questions of procedure have been settled, the principal task of the arbitral tribunal is to establish the material facts of the dispute. It does this by examining the agreement between the parties, by considering other relevant documents (including correspondence, minutes of meetings, and so on), and by hearing witnesses if necessary. The arbitral tribunal then builds its award on this foundation of facts, making its decision either on the basis of the relevant law or exceptionally, and then only if expressly authorised by the parties, on the basis of what seems to be fair and reasonable in all the circumstances.

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3.89 Once the relevant facts have been established, the arbitral tribunal may not need to go outside the confines of the agreement originally made between the parties in order to determine the dispute. This agreement, particularly in international commercial transactions, will generally be quite detailed. For example, international construction contracts run to many hundreds of closely

printed pages accompanied by detailed drawings and specifications. Properly understood, such an agreement will generally make clear what the parties intended, what duties and responsibilities they each assumed, and, in consequence, which of them must be held liable for any failure of performance that has occurred.

3.90 But, as already stated, an agreement intended to create legal relations does not exist in a legal vacuum. It is supported by a system of law which is generally known as 'the substantive law', 'the applicable law', or 'the governing law' of the contract.⁽¹¹¹⁾ These terms all denote the particular system of law that governs the interpretation and validity of the contract, the rights and obligations of the parties, the mode of performance, and the consequences of breaches of the contract.⁽¹¹²⁾

3.91 Changes in the law applicable to the contract may bring about changes in the contract itself. For instance, a country may enact currency regulations. These regulations will then apply to contracts that are governed by the law of that country. This happened in a case where the delivery of bearer bonds to their lawful owner was refused because, under the law of the then Czechoslovakia, it had become illegal for the bonds to be delivered without the consent of the Central Bank. The Central Bank refused consent. The owner of the bonds sued for their delivery, but was unsuccessful:

If the proper law of the contract is the law of Czechoslovakia, that law not merely sustains but, because it sustains, may also modify or dissolve the contractual bond. The currency law is not part of the contract, but the rights and obligations under the contract are part of the legal system to which the currency law belongs.⁽¹¹³⁾

Accordingly, it is not enough to know what agreement the parties have made. It is also essential to know what law is applicable to that agreement. In a purely domestic contract, the applicable law will usually be that of the country concerned. If a French woman purchases a dress in a Paris boutique, French law will be the applicable or substantive law of that contract. However, where the contract is in respect of an international transaction, the position is more complicated. There may then be two or more different national systems of law capable of qualifying as the substantive law of the contract; and (although it is important not to exaggerate [page "194"](#) the possibilities) these different national systems may contain contradictory rules of law on the particular point or points in issue.

i. Crossing national frontiers

3.92 An individual who crosses a national frontier on foot or by car, passport in hand, realises that he or she is moving from one country to another. After a moment's thought the traveller would realise that he or she was transferring from one legal system to another; and that indeed what is lawful in one country is not necessarily so in another.

3.93 This transition from one legal system to another is less apparent, or at least more easily forgotten, when national frontiers are crossed by electronic signals from telephones, telexes, faxes, or email. For example, an oil trader in New York may enter into an agreement by fax to buy crude oil on the spot market in Rotterdam, for shipment to a refinery in Germany. A bullion dealer in London may buy gold over the telephone from Zurich for delivery to a bank in Italy, on the basis that payment is to be made by an irrevocable letter of credit drawn on a bank in Chicago. These transactions cross national frontiers as unmistakably as travellers by road or train. Although there are no frontier posts to go through, complex questions of law may still arise because of the crossing of national boundaries. Transactions such as those mentioned take place constantly. Rules of law govern each transaction. Yet problems still arise, first, in identifying what law applies, and, secondly, in dealing with any conflict between the applicable laws.

b. The autonomy of the parties

3.94 It is generally recognised that parties to an international commercial agreement are free to choose for themselves the law (or the legal rules) applicable to that agreement.⁽¹¹⁴⁾ The doctrine of party autonomy, which was first developed by academic writers and then adopted by national courts, has gained extensive acceptance in national systems of law.⁽¹¹⁵⁾

... despite their differences, common law, civil law and socialist countries have all equally been affected by

the movement towards the rule allowing the parties to  page "195" choose the law to govern their contractual relations. This development has come about independently in every country and without any concerted effort by the nations of the world; it is the result of separate, contemporaneous and pragmatic evolutions within the various national systems of conflict of laws.⁽¹¹⁶⁾

3.95 The doctrine has also found expression in international conventions, such as the Rome Convention. The Rome Convention,⁽¹¹⁷⁾ which is applicable to contractual obligations within the European Union, accepts as a basic principle the right of parties to a contract to choose, expressly or by implication,⁽¹¹⁸⁾ the law which is to govern their contractual relationship.

3.96 If national courts are prepared, as most of them are, to recognise the principle of party autonomy in the choice of the law applicable to a contract, then *a fortiori* arbitral tribunals should also be prepared to do so. An international arbitral tribunal owes its existence to the agreement of the parties and in applying the law chosen by the parties, an arbitral tribunal is simply carrying out their agreement.

i. Recognition by international conventions

3.97 Both international conventions and the model rules on international commercial arbitration confirm that the parties are free to choose for themselves the law applicable to their contract. For example:

(i) the Washington Convention provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.⁽¹¹⁹⁾

(ii) the UNCITRAL Rules provide:

The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.⁽¹²⁰⁾

(iii) amongst the rules of arbitral institutions,⁽¹²¹⁾ the ICC Rules provide:

The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute ...⁽¹²²⁾

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As one commentator has stated:

There are few principles more universally admitted in private international law than that referred to by the standard terms of the 'proper law of the contract'—according to which the law governing the contract is that which has been chosen by the parties, whether expressly or (with certain differences or variations according to the various systems) tacitly.⁽¹²³⁾

ii. Time of choice

3.98 At its origin, the rule of party autonomy related to the freedom of the parties to choose the applicable law at the time of making their contract. It now extends (under the international conventions and rules cited) to the right of the parties to choose the law as it is to be applied at the time of the dispute.

3.99 It is logical to allow the parties to choose the law that is to govern their contract at the time when they make it. In their contract, the parties set out the rights and duties they undertake towards each other. It is appropriate that they should, at the same time, refer to the system of law by which that contract is to be governed because that law forms an essential element of the bargain between them.

3.100 There is less logic in allowing the parties to choose the applicable law once a dispute has arisen and yet, in practice, it seems that parties may do this, even if their choice of law differs from what they had chosen previously. Indeed, the Rome Convention makes express provision for this.⁽¹²⁴⁾ If any justification for this delayed choice (or even change) of law is sought in legal philosophy, it appears to lie in the concept of the autonomy of the parties.

Parties are generally free to vary the terms of their contract by agreement; in the same way, they should be free to vary by agreement the law applicable to a dispute arising out of that contract.

iii. Restrictions on party autonomy

3.101 For lawyers who practise in the resolution of international trade disputes, and who are accustomed to wending their way through a maze of national laws, the existence of a general transnational rule of law supporting the autonomy of the parties is almost too good to be true. The natural inclination is to ask whether there are any restrictions on the rule, and if so, what?⁽¹²⁵⁾

3.102 The answer is that there may be limited restrictions on the rule, designed to ensure that the choice of law is *bona fide* and is not contrary to public policy. Thus, the Rome Convention, for example, does not allow the choice of a foreign law to [page "197"](#) override the mandatory rules of law of a country to which all the factual elements of the contract point—so that, for example, the choice of a foreign law for the purposes of tax evasion or avoiding competition regulation would not be permissible.⁽¹²⁶⁾ Thus in *Soleimany v Soleimany*, the English Court of Appeal refused to enforce an award where the transaction was not illegal under the applicable law, but was illegal under English law.⁽¹²⁷⁾

3.103 The case concerned a contract between a father and son, which involved the smuggling of carpets out of Iran in breach of Iranian revenue laws and export controls. The father and son had agreed to submit their dispute to arbitration by the Beth Din, the Court of the Chief Rabbi in London, which applied Jewish law. Under the applicable Jewish law, the illegal purpose of the contract had no effect on the rights of the parties and the Beth Din proceeded to make an award enforcing the contract. In declining to enforce the award, the English Court of Appeal stated:

The Court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.⁽¹²⁸⁾

iv. The choices

3.104 Subject only to the qualifications of *bona fides*, legality, and no public policy objection, the conventions and rules on arbitration which have been mentioned make it plain that the parties may choose for themselves the law applicable to the dispute. Parties to an international commercial agreement should make full and proper use of this freedom and insert a 'choice of law' clause into their contract.

3.105 If this is not done, it will almost certainly be a matter for regret if a dispute should arise, since (as will be seen) the search for the proper law can be a long and expensive process. A choice of law clause may be drawn in very simple terms. It is usually sufficient to say: 'This agreement shall in all respects be governed by the law of England' (or of Singapore, or of the State of New York, or of any other State which has in place a modern law of contract).

3.106 The question that then arises is, given a free choice, what system of law should the parties choose as the law applicable to the dispute? Is their choice limited to the [page "198"](#) choice of a national system of law or may it extend beyond this, perhaps to rules of law such as those of the law merchant (*lex mercatoria*)? Indeed, are the parties limited to a choice of law or of legal rules? May they not, for instance, agree that the dispute should be decided according to considerations of equity and good conscience?

3.107 It is to these questions that attention must now be turned. The choices that may be available to the parties include:

- national law;
- public international law (including the general principles of law);
- concurrent laws (and combined laws—the *trunc commun* doctrine);
- transnational law (including international development law; the *lex mercatoria*; codified terms and practices; and trade usages); and
- equity and good conscience.

c. National law

3.108 In most international commercial contracts, including those where a State or State entity is one of the parties, it is usual for a given system of law to be chosen as the law applicable to the contract itself. There is much sense in such a choice. Parties who choose a law to govern their contract, or any subsequent dispute between them, will generally choose an autonomous system of law. Such a system is not merely a set of general principles or of isolated legal rules.⁽¹²⁹⁾ It is an interconnecting, interdependent collection of laws, regulations, and ordinances, enacted by or on behalf of the State, and interpreted and applied by the courts. It is a complete legal system, designed to provide an answer to any legal question that might be posed. Furthermore, a national system of law will in principle be a known and existing system, capable of reasonably accurate interpretation by experienced practitioners.

3.109 In law, as in life, there is no certainty. However, a national system of law provides a known (or at least, determinable) legal standard, against which the rights and responsibilities of the parties can be measured. In the event of a dispute, the parties can be advised with reasonable confidence as to their legal position; or, at the very least, they can be given a broad indication of their chances of success or failure. If, for example, parties to a dispute which is to be heard in Switzerland agree that the arbitral tribunal shall apply the law of France, then all concerned (arbitrators, parties, and advisers alike) know where they stand. The arbitrators will know to what system of law they have to refer, if such reference becomes necessary.  [page "199"](#) The parties and their advisers will be able to evaluate their prospects of success against the known content of French law. They will know, too, what sort of legal arguments they will have to present; and what sort of legal arguments (as to fault, compensation, and so on) they may be required to address.

i. Choice of a system of national law

3.110 The standard arbitration clauses recommended by arbitral institutions, such as the ICC, are usually followed by a note pointing out that in addition to incorporating the arbitration clause in their agreement, the parties should also add a 'choice of law' clause. In-house lawyers and others who are concerned with the drafting of contracts will invariably do this, so that in most commercial contracts it is usual to find an arbitration clause, followed by a 'choice of law' clause.

3.111 Almost invariably, the law chosen is a national law. This may be because of that law's connection with the parties to the contract; or it may simply be because the parties regard it as a system of law which is well suited to govern their commercial relations. Indeed, many contracts incorporate the choice of a particular country's law, although they have no connection with that country. For example, commodity contracts, shipping and freight contracts, and contracts of insurance often contain a choice of English law, because the commercial law of England is considered to reflect and to be responsive to the needs of modern international commerce. For similar reasons, many major reinsurance contracts contain a choice of the law of New York.

3.112 In an ideal world, almost any national system of law should be suitable, so long as that law has been drawn up, or has developed, in a manner which suits the requirements of modern commerce. In the real world, some national systems of law will be found to contain outdated laws and regulations which make them unsuitable for use in international contracts.

3.113 Indeed, even well-developed and modern codes of law are not necessarily best suited to the needs of international (as opposed to purely domestic) commerce. The law of a country reflects the social, economic, and, above all, the political environment of that particular country. If a country habitually controls the import and export trade (perhaps permitting such activities only through State corporations) and prohibits the free flow of currency across the exchanges, these restrictions will permeate the national law. This may or may not benefit the country concerned, but it is not an environment in which international trade and commerce is likely to flourish. A national law that does not permit the free flow of goods and services across national frontiers is probably not the most suitable law to govern international commercial contracts and the disputes that may arise from them.

3.114 Parties to an international commercial contract will need to bear these kinds of considerations in mind in choosing a given system of law to govern their  [page "200"](#) contractual relationships. Even in countries which favour international trade and

development, problems may arise, particularly where the contract is made with the State itself or with a State agency. The problem, shortly stated, is that the State (as legislator) may change the law and so change the terms of the contract, lawfully but without the agreement of the other party to the contract. The State may, for instance, impose labour or import restrictions, which render performance of the contract more expensive. Unless the contract has been drafted with such possible contingencies in mind—and they may be difficult to foresee—it is the private party who will suffer from this change in the equilibrium of the contract.

3.115 The problem of protecting a party from changes in the local law was considered in the *Sapphire* arbitration:

Under the present agreement, the foreign company was bringing financial and technical assistance to Iran, which involved it in investments, responsibilities and considerable risks. It therefore seems normal that they should be protected against any legislative changes which might alter the character of the contract and that they should be assured of some legal security. This would not be guaranteed to them by the outright application of Iranian law, which it is within the power of the Iranian State to change.⁽¹³⁰⁾

ii. Precluding unfair treatment

3.116 Various devices have been borrowed from private law contracts, in an attempt to maintain the balance of the contract. These include revision clauses, hardship clauses, and *force majeure* clauses, all of which have a part to play in helping to maintain the balance of the contractual relationship. In some long-term economic development agreements, the national law has been 'frozen' by the parties agreeing that the law of the State party will be applied as it was on a given date. Strictly speaking, the State law does not then operate as the applicable law, but as an immutable code of law incorporated into the contract. It will not change no matter what amendments are made to the State law itself. The problem, however (apart from the lack of flexibility that this device introduces into the contract), is that the State party may still introduce a law avoiding such clauses in its own territory. In other words, the problem of entrenching such clauses has to be faced; and whilst initially attractive, the 'freezing' solution may fly in the face of political, social, and economic realities.

iii. Stabilisation clauses

3.117 One method of introducing a 'freezing' solution, particularly in oil concession agreements, has been the inclusion of stabilisation clauses. These are undertakings [page "201"](#) on the part of the contracting State that it will not annul or change the terms of the contract by legislative or administrative action, without the consent of the other party to the contract. In one of the arbitrations which arose out of the Libyan oil nationalisations, the arbitrator held that the Libyan Government's act of nationalisation was in breach of certain stabilisation clauses and was accordingly an illegal act under international law, entitling the companies to restitution of their concessions.⁽¹³¹⁾ This decision is generally criticised as going too far, not only in its rejection of Libyan law as a basic ingredient of the governing law clause, and in its so-called 'internationalisation' of the oil concession agreement, but also in its decision in favour of *restitutio in integrum*.⁽¹³²⁾ In any event, restitution was obviously impracticable. The only purpose it could serve was to indicate the basis on which damages should be paid for the allegedly illegal expropriation.⁽¹³³⁾

3.118 In another of the Libyan oil nationalisation arbitrations, where the facts were almost identical, the sole arbitrator did *not* regard the stabilisation clauses as preventing the Government's act of nationalisation. He held that this nationalisation was a legitimate exercise of sovereign power, as long as it was accompanied by 'equitable compensation'.⁽¹³⁴⁾ In the *Aminoil* arbitration, the arbitral tribunal held by a majority (with a separate opinion attached to the award) that, properly interpreted, the stabilisation clause in the concession agreement (which was to run for a period of 60 years) did not prevent the Kuwaiti Government's act of nationalisation.⁽¹³⁵⁾

3.119 Stabilisation clauses attempt to maintain a particular legal regime in existence, often for a considerable period of time, irrespective of any changes which may occur in the political, social, and economic environment of the country concerned.⁽¹³⁶⁾ Traditionally lenders have viewed stabilisation clauses as an essential component [page "202"](#) of investment projects,

especially in developing States and States where political risk is deemed to be high. States keen to attract foreign investment have in the past seen stabilisation clauses as a way of reassuring investors that they offer a stable investment environment.⁽¹³⁷⁾

3.120 However stabilisation clauses have come under increasing scrutiny and pressure from civil society groups who argue that private investors should not be in a position to limit a host State's ability to modernise its laws. Indeed, some have criticised stabilisation clauses as being responsible for so-called 'regulatory chill'. In this sense, *Aminoil*⁽¹³⁸⁾ marked a turning point in the treatment of long-term contracts for the exploitation of national resources although the debate has now widened and encompasses other contracts and industries.⁽¹³⁹⁾

3.121 Perhaps as a result of such increasing scrutiny, some commentators now distinguish stabilisation clauses into broadly two distinct groups, namely: traditional stabilisation clauses, and economic equilibrium clauses.⁽¹⁴⁰⁾ This should not obscure the fact, however, that the variety of drafting variations of stabilisation clauses has resulted in a wide spectrum that stretches from 'freezing' clauses, on the one hand, to a proximity with *force majeure* and hardship clauses, on the other hand.

3.122 Traditional stabilisation clauses are often called 'freezing' clauses because, in their most basic form, these clauses state that the law in force at the time the contract is made will be the law that governs the contract for its entire duration. Some freezing clauses seek to achieve this by stating that any new law will not apply to the parties to the contract by virtue of the freezing clause. Others are drafted to state that in the event of a conflict between the law applicable at the time of making the contract and a newly enacted law, the former will prevail. Some are more limited and only seek to cover particular matters, for example changes to tax and [page "203"](#) customs regulations. It should be noted that freezing clauses may face enforceability issues on public policy grounds.⁽¹⁴¹⁾

3.123 As their name implies, 'economic equilibrium' (or 'renegotiation') clauses attempt to maintain the original economic equilibrium of the parties at the time of contracting, where subsequent measures might otherwise alter the expected economic benefits to which the parties have subscribed.⁽¹⁴²⁾ These clauses do not aim to freeze the law. Thus, newly enacted laws will apply to the investment. However, they will provide the investor with a contractual entitlement to be compensated for the cost of complying with new laws or, alternatively, require the parties to negotiate in good faith to restore the original economic equilibrium of the contract. Avoiding any purported restriction on the development of local law, such clauses thereby steer clear of the principal ground of criticism of 'freezing' clauses.⁽¹⁴³⁾

3.124 Both categories of stabilisation clause therefore present different ways of allocating 'change of law' risk between investors and host States. Moreover, such clauses could support claims by investors pursuant to the 'expropriation', 'fair and equitable treatment', or 'umbrella' provisions in investment treaties.

iv. Summary

3.125 In most of the international commercial disputes that are referred to arbitration, there is a choice of law clause, in addition to the arbitration clause. As already indicated, the law chosen will generally be that of a given country—the law of England, or of Switzerland, or whatever the case may be. The same is true of arbitrations that are commenced under the terms of a submission agreement.

3.126 Where the choice of law is left to the arbitrators—a situation which is discussed in more detail below—the position is perhaps less clear-cut. The arbitrators will look for the law with which the contract has the closest connection, but may balk at selecting this if it is also the national law of one of the parties, for fear of jeopardising neutrality. They may then look for one of the other possible options, which are about to be considered.

3.127 In the same way, a party to a contract with a State or State entity may well insist, or try to insist, upon one of these options. The State concerned would almost [page "204"](#) certainly not agree to subject its contracts to the law of another State; and the private party might well be unwilling to accept the national law of the State with which it was contracting, for fear of adverse changes in that law.

d. Mandatory law

3.128 Although it is generally recognised that parties to an international commercial agreement are free to choose for themselves the law (or legal rules) applicable to that agreement, there are limits to this freedom. Mandatory rules have been defined as those that 'cannot be derogated from by way of Contract',⁽¹⁴⁴⁾ and may feature in the determination of a contractual dispute in addition to the governing law selected by the parties.

3.129 Thus, by way of example, Russian law may feature in the determination of corporate governance issues relating to a Russian company even if the arbitration arises from a shareholders agreement governed by Swedish law. In the same way, to take another example, US-quoted companies cannot exclude the application of the Foreign Corrupt Practices Act from the operations simply by concluding an investment agreement in Kazakhstan that is subject to Kazakh law. Moreover, in yet another example that the authors have seen in practice in an ICC case in Paris, the commercial export of defence technology from the United States to the Gulf region will be subject to the US International Trade in Arms Regulations, even if the supply contract in question is governed by the law of the United Arab Emirates. However, perhaps the most frequently encountered instance of the application of mandatory law is competition or anti-trust law, and the authors now proceed to use that as an illustration.

3.130 As already discussed in Chapter 2,⁽¹⁴⁵⁾ at one time it was widely considered that the private forum of arbitration was not appropriate for the determination of claims under competition law. Landmark judgments such as that of the US Supreme Court in *Mitsubishi Motor Corp v Soler Chrysler-Plymouth*,⁽¹⁴⁶⁾ however, have long ago confirmed the arbitrability of competition law issues. A more recent decision of the ECJ goes further, and suggests that, in Europe at least, arbitral tribunals may be duty-bound—or at least have a discretion—to address issues of European competition law *ex officio*, even where they have not been raised by the parties themselves, because such issues constitute a matter of public policy.⁽¹⁴⁷⁾  [page "205"](#) Indeed, as a matter of public policy, European competition law would need to be taken into account even if the substantive law chosen by the parties is not a European national law.

3.131 Thus, in *Eco Swiss China Limited v Benetton Investment NV*,⁽¹⁴⁸⁾ an arbitral tribunal seated in the Netherlands found Benetton liable for wrongfully terminating an exclusive licensing agreement by which Eco Swiss was given the exclusive right to sell watches and clocks bearing the words 'Benetton by Bulova' throughout Europe. Benetton challenged the award before the Dutch courts, claiming annulment on the grounds, *inter alia*, that the exclusive licensing agreement was anti-competitive under Article 81 of the EU Treaty, and that therefore an award that enforced such an agreement was contrary to public policy. This issue had been raised neither by the parties nor by the arbitrators during the arbitration.

3.132 The case travelled up to the Hoge Raad of the Netherlands, which sent several questions of European law to the ECJ for determination, including the following two:

- (i) To what extent and under what conditions are arbitrators deciding a private law dispute under a duty to apply EU law *ex officio*, and this in the context of the Dutch Code of Civil Procedure, where arbitrators are not at liberty to apply those provisions of their own motion?
- (ii) In circumstances in which an arbitral award is contrary to Article 81 of the EU Treaty, could a Dutch court annul the award as being contrary to public policy, where, under Dutch law, public policy generally does not cover the mere fact that the award gives no effect to a prohibition laid down by competition law?

In his opinion issued prior to the ECJ's decision, Advocate General Saggio gave a negative answer to the first question of whether arbitrators are under a duty to apply community law *ex officio*, opining that arbitrators should not be under a duty to consider issues 'outside the orbit of the dispute as defined by the parties'.⁽¹⁴⁹⁾

3.133 On the second question of whether a Dutch court could annul an award on grounds of public policy that was inconsistent with European competition law, however, his answer was affirmative. Having concluded that an arbitral tribunal was not under a duty to raise issues of European competition law *ex officio*, he opined that it was up to national courts exercising their powers of review of arbitral awards to ensure consistency with European competition law that qualified as rules of '*ordre public économique communautaire*'.

3.134 The ECJ followed the Advocate General's opinion on the second question, finding that a violation of European community law made an award liable to be set aside by a national court because European competition law qualified as a matter of public policy. On this basis, it saw no need to address the question of whether arbitrators have a duty to apply European competition law *ex officio*.

3.135 Taking together the Court's decision and the Advocate General's opinion, and even if no express duty to raise European competition law issues *ex officio* was recognised, the ECJ was at the very least signalling the existence of a powerful incentive to arbitral tribunals themselves to raise and apply issues of European competition law if they are concerned about potential challenges to, and ultimate enforceability of, their awards in Europe.⁽¹⁵⁰⁾

e. Public international law and general principles of law

3.136 Public international law is concerned primarily with States, but not exclusively so.⁽¹⁵¹⁾ As Dame Rosalyn Higgins, a former President of the ICJ, has contended, international law is a dynamic (not static) decision-making process, in which there are a variety of participants:

Now, in this model, there are no 'subjects' and 'objects', but only *participants*. Individuals *are* participants, along with states, international organizations (such as the United Nations, or the International Monetary Fund (IMF) or the ILO), multinational corporations, and indeed private non-governmental groups.⁽¹⁵²⁾

3.137 Amongst the 'participants' to whom President Higgins referred are those individuals and corporations who brought claims before the Iran-US Claims Tribunal and those 'investors' who seek to protect their investment through the machinery of ICSID.⁽¹⁵³⁾ This has brought public international law into sharper focus so far as private individuals and corporations—and their lawyers—are concerned. Increasingly, 'international law' may be specified as the substantive law of a contract, particularly where that contract is with a State or State agency. The reference may be to 'international law' on its own; or it may be—as discussed below—used in conjunction with a national system of law.

3.138 Reference has already been made to the freedom which parties (generally) have in selecting the law or the legal rules applicable to their contract. There is no reason in principle why they should not select public international law as the law which  [page "207"](#) is to govern their contractual relationship.⁽¹⁵⁴⁾ To quote again from President Higgins:

The increasing importance of international arbitration is an area that we should perhaps be watching. It is now commonplace for a foreign private corporation and a state who have entered into contractual relations to agree to international arbitration in the event of a dispute. (And, in principle, the private party could be an *individual*, though as such he will probably have less leverage than a foreign corporation and may well have to accept the local legal system rather than reference to international arbitration). The applicable law clause may designate a national legal system, but more usually it will refer to 'general principles of law' or 'the law of country X and the relevant principles of general international law', or some such similar formula. At one bound, therefore, the private party has escaped the need to have his claim brought by his national government, and can invoke international law. Thus, if State X and Mr Y have a contract, State X's ability to vary the terms of that contract will be interpreted by reference to the relevant principles of international law; and compensation due to Mr Y will likewise be appraised by reference to international law ... Arbitral clauses which refer to international law as the applicable law effectively remove the alleged inability of individuals to be the bearer of rights under international law. This is being done by mutual consent, of course—but the point is that there is *no inherent reason* why the individual should not be able directly to invoke international law and to be the beneficiary of international law.⁽¹⁵⁵⁾

3.139 There are many sources of public international law, including international conventions and international custom, but probably the most relevant, so far as non-State Parties are concerned, are 'the

general principles of law recognised by civilised nations'.⁽¹⁵⁶⁾ These have been defined as 'the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States'.⁽¹⁵⁷⁾

3.140 However, the problem of adopting public international law as the system of law which is to govern a commercial relationship is not a problem of principle, but of practice. Public international law, being concerned primarily with the relationship  [page "208"](#) between States, is not particularly well equipped to deal with detailed contractual issues—such as mistake, misrepresentation, time of performance, the effect of bankruptcy or liquidation, *force majeure* or the measure of damages, and so forth. The same criticism may be directed at the choice of 'general principles of law' as the governing law of a commercial contract. The problem with the general principles is they are just that. They deal with such topics as the principle of good faith in treaty relations, abuse of rights, the concept of State and individual responsibility. They are excellent as generalisations, but lack sufficient detail.⁽¹⁵⁸⁾ That is why the authors suggest that if they are to be used in a contract, they should be used as a concurrent law, rather than on their own.

f. Concurrent laws, combined laws, and the *trunc commun* doctrine

3.141 As already indicated in the discussion of contracts to which a State or State entity is a party, one of the main anxieties of commercial organisations engaged in trading or other business relationships with a sovereign State is that, after the bargain has been struck and the contract has been signed, the State may change its own law to the disadvantage of the private party.

3.142 One established safeguard against unfair or arbitrary action by the State party to the contract is to stipulate that the State's own law will apply only insofar as it accords with either public international law, the general principles of law, or some other system with accepted minimum standards.

3.143 The Washington Convention, which established ICSID, makes use of this system of concurrent laws. The Convention⁽¹⁵⁹⁾ provides for the resolution of disputes between a State (or a State entity) and a private party.⁽¹⁶⁰⁾ It stipulates that if a dispute arises and there has been no express choice of law by the parties, the arbitral tribunal will apply the law of the contracting State party to the arbitration *and* such rules of international law as may be applicable'. Thus, honour is satisfied. The State's own law is given proper recognition. Yet some fetter is imposed upon possibly unfair or arbitrary action, by the reference to public international law.⁽¹⁶¹⁾

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3.144 This is a system of concurrent laws. For example, a State that terminated a long-term investment contract by an act of nationalisation would presumably do so in a way that was valid under its own law. However, such an act of nationalisation would not be valid under international law unless it was shown to be non-discriminatory and to serve a public purpose, with proper compensation being offered. In this way, international law would be brought into play to set a minimum standard, which the arbitral tribunal would be empowered to uphold in its award.⁽¹⁶²⁾

i. The Libyan oil nationalisation arbitrations

3.145 The coupling of national law with international law is seen in the three arbitrations that arose out of the Libyan oil nationalisations, the *Texaco*, *BP*, and *Liamco* arbitrations, although it only worked effectively in one of them.⁽¹⁶³⁾

3.146 The choice of law clause was identical in the different concession agreements that came before three different arbitrators. It read as follows:

This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.⁽¹⁶⁴⁾

In the event, this clause was interpreted in three different ways by the three different arbitrators. In the *Texaco* arbitration, the sole arbitrator held that the clause was primarily a choice of public

international law. In the *BP* arbitration, the sole arbitrator appears to have regarded it as a choice of the general principles of law.⁽¹⁶⁵⁾

3.147 The sole arbitrator in the *Liamco* arbitration held that the governing law of the contract was the law of Libya but that the clause excluded any part of that law which was in conflict with the principles of international law.⁽¹⁶⁶⁾

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3.148 The arbitral tribunal in the *Aminoil* arbitration arrived at a similar conclusion in respect of a concession agreement that had been brought to an end by an act of nationalisation, coupled with an offer of 'fair compensation'. The Government of Kuwait and Aminoil agreed in the submission agreement that their dispute should be settled by arbitration 'on the basis of law', but left the choice of law to the tribunal with the stipulation that the tribunal should have regard to 'the quality of the parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world'.⁽¹⁶⁷⁾ On this basis, *Aminoil* argued that the concession agreement was governed by transnational law, which it equated with the general principles of law, including the principles of *pacta sunt servanda*, reparation for injury, respect for acquired rights, the prohibition of unjust enrichment, and the requirement of good faith (including the prohibition against abuse of rights and estoppel or preclusion). The Government, for its part, argued for the application of the law of Kuwait, of which public international law formed part.

3.149 It is useful to look at the tribunal's decision on the applicable law for two reasons. First, the State actually took part in the *Aminoil* arbitration, unlike Libya in the Libyan arbitrations. Secondly, the dramatic increase in the length of ICSID arbitrations has focused attention on concurrent law clauses.

3.150 The tribunal in *Aminoil* stated that the question of the law applicable to the substantive issues in dispute before it was a simple one. The law of Kuwait applied to many matters with which it was directly concerned; but, as the Government had argued, established public international law was part of the law of Kuwait, and the general principles of law were part of public international law.⁽¹⁶⁸⁾ The tribunal concluded:

The different sources of the law thus to be applied are not—at least in the present case—in contradiction with one another. Indeed, if, as recalled above, international law constitutes an integral part of the law of Kuwait, the general principles of law correspondingly recognize the rights of the State in its capacity of supreme protector of the general interest. If the different legal elements involved do not always and everywhere blend as successfully as in the present case, it is nevertheless on taking advantage of their resources, and encouraging their trend towards unification, that the future of a truly international economic order in the investment field will depend.⁽¹⁶⁹⁾

3.151 The use of a system of concurrent laws, such as that envisaged by the Washington Convention in the absence of an express choice of law by the parties to the dispute, seems to be the way forward for international contracts to which a State or State entity is a party. The reference to the law of the State concerned gives proper  [page "211"](#) importance to the sovereign position of the State party; yet the reference to international law, or possibly to the general principles of law, provides a measure of protection to the private party to the contract. There is a balance to be struck between State law and international law. It is important that arbitral tribunals should be prepared to give due weight to both.

3.152 The previous discussion has shown where the search for a 'neutral' law may lead, particularly in relation to State contracts.⁽¹⁷⁰⁾ However, the search for such a law is not confined to State contracts. One solution, which has been canvassed in theory, and occasionally adopted in practice, is to choose the national laws of both parties and so obtain the best (or possibly the worst) of both worlds. This *trunc commun* doctrine is based on the proposition that, if free to do so, each party to an international commercial transaction would choose its own national law to govern that transaction. If this proves unacceptable, why not go some way towards achieving this objective by identifying the common parts of the two different systems of law and applying these common parts to the matters in dispute?⁽¹⁷¹⁾

3.153 The *Sapphire* arbitration has already been mentioned as an illustration of the problem of affording protection to the private party

to a State contract against changes in the national law enacted by the State party.⁽¹⁷²⁾ There was no express choice of law in the contract. There were, however, choice of law clauses in similar concession agreements previously made by the respondent, the National Iranian Oil Company, which were in the following terms:

In view of the diverse nationalities of the parties to this Agreement, it shall be governed by and interpreted and applied in accordance with the principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles then by and in accordance with principles of law recognised by civilised nations in general, including such of those principles as may have been applied by international tribunals.

3.154 This choice of law clause appears to be an adoption of the *trunc commun* solution to the choice of law problem. This would require the arbitrator to find out what principles existed in the law of Iran, which were also to be found in the national laws of the other parties to the agreement, and apply those common principles to the matters in dispute before him. However, the arbitrator adopted a different approach. He read the clause as entitling him to disregard the law of Iran (although [page "212"](#) this was specifically mentioned in the choice of law clause) and to apply the general principles of law. What the arbitrator said was:

It is quite clear from the above that the parties intended to exclude the application of Iranian law. But they have not chosen another positive legal system and this omission is on all the evidence deliberate. All the connecting factors cited above point to the fact that the parties therefore intended to submit the interpretation and performance of their contract to principles of law generally recognised by civilised nations, to which article 37 of the agreement refers, being the only clause which contains an express reference to an applicable law.

3.155 Many years after the *Sapphire* arbitration, another important example of combined laws (or again, more correctly, of combined legal principles) came to be generally reported (and sometimes misreported). In the Channel Tunnel project, the concessionaires, Eurotunnel, entered into a construction contract with a group of Anglo-French companies, known as Trans-Manche Link. Surprisingly, this agreement between two private entities referred not to the national law of either party, nor indeed to any national system of law, but instead to the common principles of both systems of law.⁽¹⁷³⁾ The relevant clause provided that the contract would:

... in all respects be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals.

3.156 A dispute under the construction contract went to the English High Court and this choice of law clause was considered both by the Court of Appeal and by the highest court in England, the House of Lords.⁽¹⁷⁴⁾ In the Court of Appeal, one of the judges said:

Since both Eurotunnel and the contractors were partly French and partly English, I wonder why they did not choose either English law or French law exclusively—and for that matter why they chose Brussels as the seat of any arbitration. The hybrid system of law which they did choose has a superficial attraction, but I suspect that it will lead to lengthy and expensive dispute.⁽¹⁷⁵⁾

3.157 This comment turned out to be accurate.⁽¹⁷⁶⁾ The search for common principles of English and French law meant that for each dispute that arose under the construction [page "213"](#) contract—and there were many—teams of French and English lawyers on each side had to determine what the answer was likely to be under the applicable principles of their own law and then work out to what extent, if at all, these principles were common to both systems of law. As one of the construction group's external counsel has commented:

The main reason for the difficulty in applying a clause providing for the application of common principles between English and French law is that although both systems tend to produce the same or very similar

results, they fall short of providing the set of common principles which is necessary to cover all contractual disputes.⁽¹⁷⁷⁾

3.158 Although the Court of Appeal was, in passing, critical of this choice of law clause—as a hybrid system of law—it did not suggest that it was anything other than a binding and enforceable agreement. This emerges even more strongly in the decision of the House of Lords:

The parties chose an indeterminate 'law' to govern their substantive rights; an elaborate process for ascertaining those rights; and a location for that purpose outside the territories of the participants. This conspicuously neutral, 'a-national' and extrajudicial structure may well have been the first choice for the special needs of the Channel Tunnel venture. But whether it was right or wrong, it is the choice which the parties have made.⁽¹⁷⁸⁾

3.159 The Channel Tunnel project was one of the major international construction contracts of the twentieth century.⁽¹⁷⁹⁾ Of course, even if only one system of law had been chosen as the applicable law, both French and English lawyers would have been needed to deal with the financing of the project, as well as 'domestic' issues such as staff accommodation on either side of the Channel, labour relations, and so on; but the dispute resolution process itself would have been simpler, less expensive, and, it is suggested, much more predictable.

3.160 There are many large international projects in which lawyers from different countries are likely to be needed. In such major projects, the expense involved in [page "214"](#) searching for the common principles of two national systems of law, or for 'the common part' of these two national laws, may perhaps be justified (particularly if the two systems are known to have much in common).⁽¹⁸⁰⁾ However, in ordinary trading contracts, of the kind that constitute the day-to-day substance of international commerce, it must be doubtful whether the additional trouble and expense can be justified.

3.161 In summary, it is suggested that in ordinary international commercial contracts, including construction contracts, the parties would do well to try to agree upon a given national law as the law of the contract. It may take time to reach agreement, but it would be time well spent. Where one of the parties to the contract is a State or a State agency it may be necessary to adopt a system of concurrent laws (which may not be easy to operate, but which will probably be better than a system of combined laws).

g. Transnational law (including *lex mercatoria*; the UNIDROIT Principles; trade usages; and the Shari'ah)

i. Introduction

3.162 The reference to 'such rules of international law as may be applicable' (as, for example, in the Washington Convention),⁽¹⁸¹⁾ or to 'the relevant principles of international law' (as in the Channel Tunnel Treaty) serve to remind us that it is not the whole *corpus* of law, but only certain specific rules of law that are likely to be relevant in any given dispute. For example, an international contract for the sale of goods governed by the law of Austria will usually bring into consideration only those provisions of Austrian law which deal with the sale of goods. An international construction project that is governed by the law of England will principally involve consideration of those particular areas of law which are concerned with construction contracts. This breaking down of the whole body of the law into specific, discrete sections is reflected by increased specialisation within the legal profession itself. Thus, for example, within an association of lawyers such as the International Bar Association, there are specialist groups whose primary expertise is in energy law or intellectual property or construction law—and so forth.⁽¹⁸²⁾

3.163 In these circumstances, it seems appropriate to ask whether or not a particular group of bankers, or merchants, or traders, may develop their own special rules of conduct which gradually acquire the force of law, either by themselves or by incorporation into national law or international treaty. Experience suggests that the [page "215"](#) answer to this question is a cautious 'yes'. Indeed, in the past this is how much of our law developed. Columbus, for example, tells of the early maritime codes such as the Rhodian Sea Law which dated from the second or third century BC and which was 'of great authority in the Mediterranean, for its principles were

accepted by both Greeks and Romans and its memory lasted for a thousand years'.⁽¹⁸³⁾ This was an early form of transnational law, as indeed was the celebrated *Consolato des Mare* which, again according to Columbus:

throughout the Middle Ages, reigned supreme in the Mediterranean until the advent of sovereign states, national legislation superseding the customary laws of the sea, so often incorporating many of its rules.⁽¹⁸⁴⁾

3.164 It is significant that, within time, the 'customary laws of the sea' were superseded by legislation. As States evolve, this is almost inevitable. In the present day world of sovereign States and complex legislation, it may be questioned whether there is still room for the crystallisation of customary practices into rules of law. Even if there is, it is likely to be confined to particular usages and to particular trades—and to grow, so to speak, in the interstices of existing laws, rather than to form one vast *corpus* of law.

3.165 There are many different communities carrying on activities which may be as diverse (and have as little in common) as the transport of goods or the establishment of an international telecommunications network. The rules of law that are relevant to these different commercial activities are in themselves likely to be very different. They may share certain basic legal concepts—such as the sanctity of contracts (*pacta sunt servanda*)—but even here different considerations are likely to apply. For example, an international contract for the sale of goods will be performed within a comparatively short timescale. Compare this to a major infrastructure project that will take many years to perform and during the course of which the basis upon which the original bargain was struck may change dramatically.

3.166 Given these words of caution, the approach adopted in this book is pragmatic rather than theoretical. This is probably the most useful approach, since in practice lawyers and arbitrators are concerned with a particular dispute or series of disputes rather than with some 'general theory' of law. A Report on Transnational Rules by the International Law Association (ILA) formulated an approach in the following terms:

The Committee's approach in its continuing study of transnational law has been to step back from the highly contentious issues that arise from any theoretical consideration of transnational law, or *lex mercatoria*, as a discrete body of principles and to examine, in [page "216"](#) a pragmatic way, the application of individual identifiable principles at least as a phenomenon of international commercial arbitration, which it undoubtedly is.⁽¹⁸⁵⁾

ii. The *lex mercatoria*

3.167 One of the most important developments in the field of transnational law was that of the *lex mercatoria*. This draws on the sources of law which have already been mentioned, including public international law generally and the general principles of law specifically. It also draws on the UNIDROIT Principles of International Commercial Law (the UNIDROIT Principles) and the 1998 Principles of European Contract Law, which are discussed later.

3.168 This modern version of a 'law merchant' is taken to consist of rules and practices which have evolved within the international business communities. The late Professor Goldman, who named this new 'law' and who contributed greatly to its development,⁽¹⁸⁶⁾ refers to it as having had 'an illustrious precursor in the Roman *jus gentium*',⁽¹⁸⁷⁾ which he describes as 'an autonomous source of law proper to the economic relations (*commercium*) between citizens and foreigners (*peregrine*)'.⁽¹⁸⁸⁾

3.169 The advantage of such a code of law is obvious. It would be adapted to the needs of modern international commerce and it would be of uniform application. The problem is whether such a system of law, which might have existed in Roman times or in the Middle Ages, can arise spontaneously—as it were—amongst States which already possess in full measure their own laws, orders, and regulations. Amongst some commentators, the new *lex mercatoria* has been greeted with approval.⁽¹⁸⁹⁾ Others have been politely sceptical⁽¹⁹⁰⁾ or (in the context of State contracts) have [page "217"](#) dismissed it as an idea whose time has passed, since more sophisticated laws and rules now exist.⁽¹⁹¹⁾ Others still have been openly hostile.⁽¹⁹²⁾ What, then, is this new 'law' which has aroused so much controversy and which, from time to time, has made its

appearance in arbitral awards and in court proceedings?

3.170 For Professor Goldman, the distinguishing features of the *lex mercatoria* were its 'customary' and 'spontaneous' nature.⁽¹⁹³⁾ It was his view that international commercial relationships:

... may perfectly well be governed by a body of specific rules, including transnational custom, general principles of law and arbitral case law. It makes no difference if this body of rules is not part of a legal order⁽¹⁹⁴⁾ comporting its own legislative and judicial organs. Within this body of rules, the general principles of law are not only those referred to in Article 38(a) of the Statute of the International Court of Justice; there may be added to it principles progressively established by the general and constant usage of international trade.⁽¹⁹⁵⁾

3.171 It is not difficult to envisage rules developing in a particular area of international trade—such as documentary credits—and eventually being codified, either in national legislation or by international treaty, so as to attain the force of law.⁽¹⁹⁶⁾ But the custom in question is usually that of a particular trade or industry. The point has already been made that international traders do not constitute one single homogeneous community. Instead they constitute a myriad of communities, each with their own different customary rules. How are these very different and specific rules to evolve into universal rules of international trade law?

3.172 Rather than pose these theoretical questions, it is perhaps more useful to ask: what is this new law? What principles does it embody? What specific rules does it lay down? In short, what is its content?

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3.173 There appear to be two alternative approaches towards assessing the content of the new *lex mercatoria*: the 'list' method, and the functional method.

The list method

3.174 So far as the 'list' method is concerned, various lists of rules or principles have been prepared over the past decade,⁽¹⁹⁷⁾ drawing amongst other things upon the UNIDROIT Principles and the 1998 Principles of European Contract Law.⁽¹⁹⁸⁾ The list process has been criticised as lacking flexibility. To counter this criticism, Professor Berger has proposed 'creeping codification':

Creeping codification is to be distinguished from more formalized techniques for defining the *lex mercatoria* (UNIDROIT and Lando Principles): it is intended to avoid the 'static element' characteristic of other approaches and to provide the openness and flexibility required in order to take account of the rapid development of international trade and commerce.⁽¹⁹⁹⁾

'Creeping codification' is intended to ensure that a list of transnational commercial principles is capable of being rapidly and continually revised and updated. Professor Berger has established the Central Transnational Law Database⁽²⁰⁰⁾ as the institutional framework within which to develop and update on an ongoing basis the list.⁽²⁰¹⁾

The functional method

3.175 The alternative approach involves identifying particular rules of the *lex mercatoria* as and when specific questions arise. This so-called 'functional approach' regards the *lex mercatoria* as a method for determining the appropriate rule or principle. Professor Gaillard is a leading exponent of this approach.⁽²⁰²⁾ He emphasises that the controversy, which initially focused on the existence of transnational rules, has shifted. It is now:

... concentrating more recently on the establishment in further detail of the *content* of those rules or the more systematic assessment of the means to do so. As a result,  [page "219"](#) very significant differences of opinion on how such goals may be achieved have emerged.⁽²⁰³⁾

3.176 According to Gaillard, the functional approach presents the advantage that any claim made by a party in a given case would

necessarily find an answer, which may not be the position under the list approach.⁽²⁰⁴⁾

3.177 As a practical matter, when arbitrators seek to identify the content of the *lex mercatoria*, they draw increasingly on the UNIDROIT Principles:

If the Unidroit Principles embody concepts already in the *lex mercatoria*, ... these Principles would seem to provide a point of explicit reference for arbitral tribunals. And this is exactly what appears to be happening: the Unidroit Principles have already been referred to in about thirty ICC cases, it is recently reported, in order to identify general legal principles.⁽²⁰⁵⁾

3.178 The usefulness of the UNIDROIT Principles and of the Lando Principles (which set out rules common to the main legal systems surveyed) has also been recognised by Fortier:

The result—a concrete, usable list of principles and rules—addresses head-on the traditional concern of practitioners that the *lex* is too abstract and impractical to be of any use in the real world.⁽²⁰⁶⁾

3.179 Fortier refers to this set of rules as the ‘new, new *lex mercatoria*’. The fact that the UNIDROIT Principles embody concepts within the *lex mercatoria*, but are not a source of it, has similarly been stressed by Professor Mayer, who has published a useful survey of ICC awards on the issue:⁽²⁰⁷⁾

Each arbitral award stands on its own. There is no doctrine of precedence or of *stare decisis* as between different awards; and in general there is no appellate court to sort the wheat from the chaff. There is, in this sense, no formal control of the arbitral process.⁽²⁰⁸⁾ Arbitrators are free to decide as they choose. Conscientious arbitrators will obviously do their utmost to ensure that their decision is made in accordance with the law governing the contract. Their professional conscience will demand no less; and they will not decide *ex aequo et bono* without the express authorisation of the parties. But if the law governing the contract consists of those rules or principles which the arbitrators consider most appropriate, and which may conveniently be labelled as part of the *lex mercatoria*, those arbitrators are in effect free to decide in [page "220"](#) accordance with what they consider to be just and equitable, whilst purporting to decide in accordance with legal rules.

This is a pertinent observation. Under the guise of applying the *lex mercatoria*, an arbitral tribunal may in effect pick such rules as seem to the tribunal to be just and reasonable—which may or may not be what the parties intended when they made their contract.

3.180 The *lex mercatoria* has made an impact upon the law of international commercial arbitration.⁽²⁰⁹⁾ It has also served to remind both the parties to international commercial arbitration, and the arbitral tribunals who are called upon to resolve their disputes, that they are operating at an international level and that different considerations may come into play from those to be found in purely national, or domestic, arbitrations.

3.181 Where the *lex mercatoria* is said to govern the parties' contract, either by agreement of the parties themselves or by a decision of the tribunal, will a court enforce that choice of law, if called upon to do so? Secondly, will such a court enforce an award made in conformity with the *lex mercatoria*, if called upon to do so?

3.182 In principle, the answer to both questions appears to be ‘yes’. If the parties have agreed upon a particular method of dispute resolution, the court should be prepared to enforce that agreement following normal contractual principles.⁽²¹⁰⁾ Again, if the arbitral tribunal has carried out the mission entrusted to it, and has decided the case in accordance with the rules of law chosen by the parties, there would seem to be no reason why a court should refuse to enforce the award. The tribunal has simply done what the parties empowered it to do. So far as concerns enforcement of the award, the resolution adopted by the ILC expresses the position that should sensibly be taken:⁽²¹¹⁾

The fact that an international arbitrator has based an award on transnational rules (general principles of law, principles common to several jurisdictions,

international law, usages of trade, etc) rather than on the law of a particular State should not itself affect the validity or enforceability of the award:

- (i) where the parties have agreed that the arbitrator may apply transnational rules; or
- (ii) where the parties have remained silent concerning the applicable law.⁽²¹²⁾

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This position has been adopted by various national courts, including the French Court de cassation, the Austrian Supreme Court, and the English Court of Appeal.⁽²¹³⁾

iv. UNIDROIT Principles

3.183 The influence of codified terms and practices in the concept and development of a new *lex mercatoria* has already been noted. For example, the Uniform Custom and Practice for Documentary Credits, formulated as long ago as 1933,⁽²¹⁴⁾ has helped significantly in moving towards a single, uniform international standard for the interpretation of documentary credits—those valuable pieces of paper upon which much of international trade depends. Similarly, the INCOTERMS or 'International Rules for the Interpretation of Trade Terms' are intended to give a consistent, uniform meaning to terms which are in frequent use in international trade—so that expressions such as 'ex works', 'CIF', and 'FOB' should mean the same to businessmen and traders in São Paulo as they do in London or New York.⁽²¹⁵⁾

3.184 Reference has already been made to the UNIDROIT Principles of International Commercial Contracts.⁽²¹⁶⁾ They are, in nature, a restatement of the general principles of contract law. The principles are comprehensive:⁽²¹⁷⁾ they cover not only the interpretation and performance of contractual obligations, but also the conduct of negotiations leading to the formation of a contract. The emphasis is, not surprisingly, on good faith and fair dealing.⁽²¹⁸⁾ The aim of the UNIDROIT Principles is to establish a neutral set of rules that may be used throughout the world, without any particular bias to one system of law over another. As one experienced commentator has said:

They were not drafted in the interest of a specific party or lobbying group. They will strike a fair balance between the rights and obligations of all parties to the contract.⁽²¹⁹⁾

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3.185 The UNIDROIT Principles 'represent a system of rules of contract law'.⁽²²⁰⁾ They apply only when the parties choose to apply them to their contract, or have agreed that their contract will be governed by 'general principles of law' or the *lex mercatoria*.⁽²²¹⁾ However, in practice, arbitral tribunals may themselves decide to refer to the UNIDROIT Principles as an aid to the interpretation of contract terms and conditions; or even as a standard to be observed—for instance, in the negotiation of a contract.

3.186 Indeed, in one case, a European claimant had concluded a contract for technology exchange with a Chinese counterparty without incorporating a governing law clause. The European claimant argued in favour of Swedish law, basing itself on the choice of Sweden as a place of arbitration. The Chinese party argued in favour of Chinese law, because China had the closest connection with the contract. The tribunal relied on Article 24(1) of the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, which permitted it to apply 'the law or rules of law which the tribunal considers to be most appropriate'. Having decided that no common intention as to a particular national system of law could be found, the tribunal decided as follows:

In the Tribunal's view, it is reasonable to assume that the contracting parties expected that the eventual law chosen to be applicable would protect their interest in a way that any normal business man would consider adequate and reasonable, given the nature of the contract and any breach thereof, and without any surprises that could result from the application of domestic laws of which they had no deeper knowledge. This leads the Tribunal to conclude that the issues in dispute between the parties should primarily be based, not on the law of any particular jurisdiction, but on such rules of law that have found their way into international codifications or such like

that enjoy a widespread recognition among countries involved in international trade ... the only codification that can be considered to have this status is the UNIDROIT Principles of International Commercial Contracts ... The Tribunal determines that the rules contained therein shall be the first source employed in reaching a decision on the issues in dispute in the present arbitration.⁽²²²⁾

3.187 One example will indicate how the UNIDROIT Principles are intended to work. In many forms of contract, the party that bears the major responsibility for performance will seek either to limit its liability or even to exclude liability altogether. Thus a clause in a construction contract may, for example, stipulate that the [page "223"](#) contractor has no liability for loss of profit arising out of any breach of the contract, whether caused by negligence or any other breach of duty. The question then arises as to the scope of this clause and, in particular, whether in specific circumstances it may be set aside altogether.⁽²²³⁾ In relation to such a claim, the UNIDROIT Principles state:

A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.⁽²²⁴⁾

The effect of such a clause, in a dispute to which the UNIDROIT Principles are applicable, is to permit an arbitral tribunal to disregard the exemption clause in appropriate circumstances. In each case, it will be for the tribunal to decide what was the purpose of the contract and whether, in all the circumstances, it would be 'grossly unfair' to apply the exemption clause.

v. Trade usages

3.188 As already mentioned, institutional rules (such as those of the ICC) and international arbitration rules (such as those of UNCITRAL) require an arbitral tribunal to take account of relevant trade usage.⁽²²⁵⁾ A similar requirement is to be found in the Model Law⁽²²⁶⁾ and in some national legislation, such as the Netherlands Arbitration Act 1986.⁽²²⁷⁾

3.189 The relevant trade usages will have to be established by evidence in any given case (unless the arbitrators are familiar with them and make this clear to the parties). However, organisations such as the ICC have been prominent in attempting to establish a commonly understood meaning for expressions that are in frequent use in international trade contracts. Terms such as 'ex works', 'CIF', 'FOB', and so forth are expressions which are in common use and which are intended to set out, in an abbreviated form, the rights and obligations of the parties. It is obviously important that they should have the same meaning worldwide. To this end, the precise extent of these rights and obligations is spelt out as INCOTERMS (or 'International Rules for the Interpretation of Trade Terms').⁽²²⁸⁾ In much the same way, the Uniform Customs and Practice for Documentary Credits (formulated as [page "224"](#) long ago as 1933) have proved valuable in moving towards a single international standard for the interpretation of these important instruments of world trade.⁽²²⁹⁾

3.190 Standard form contracts are commonplace in many fields, eg, the shipping trade, the commodity markets, the oil industry. The step from the establishment of international terms and conditions to the establishment of uniform rules for the interpretation of these terms and conditions is a small but important one. Such uniform rules may only apply within the ambit of a national system of law. But if the same rules are uniformly applied by different national courts, or by arbitral tribunals, the basis is laid for the establishment of a customary law which will have been created by merchants and traders themselves (rather than by lawyers) and which may achieve international recognition.

vi. The Shari'ah

3.191 Islamic law, which applies across a broad swathe of Muslim countries,⁽²³⁰⁾ embodies not only the Qur'an but also other sources of Islamic law.⁽²³¹⁾ Modern codes of law in Islamic countries take account of the Shari'ah, often as a principal source of law.⁽²³²⁾ The Shari'ah itself contains general principles, which are basic to any civilised system of laws, such as good faith in the performance of

obligations and the observance of due process in the settlement of disputes.⁽²³³⁾ Although there are differences from country to country (partly as a result of the different schools of Islamic law and partly due to the fact that some States are more open to Western influences than others), Islamic law, traditions, and language give these States a common heritage and to some extent a common approach to arbitration.⁽²³⁴⁾

3.192 In a case which came before the English High Court, a financial transaction had been structured in a manner (an 'Estisna form') which ensured that the transaction conformed with orthodox Islamic banking practice.⁽²³⁵⁾ There was provision for any disputes to be settled by arbitration in London under the ICC Rules and there was a choice of law clause which provided for any dispute to be 'governed by [page "225"](#) the Law of England except to the extent it may conflict with Islamic Shari'ah, which shall prevail'. A dispute arose and the ICC appointed as sole arbitrator Mr Samir Saleh, an experienced lawyer and expert on Shari'ah law. The arbitrator's award was challenged by the losing party, but this challenge was rejected by the English court which held that the award was a clear and full evaluation of the issues and had all the appearances of being right.⁽²³⁶⁾

3.193 However, according to Professor Fadlallah, 'the landscape was clouded'⁽²³⁷⁾ by three well-known awards which, in his view, are not confined to history⁽²³⁸⁾ and continue to have 'harmful effects.'⁽²³⁹⁾ on the development of Euro-Arab arbitration. These cases are: *Sheikh Abu Dhabi v Petroleum Development Ltd*,⁽²⁴⁰⁾ *Ruler of Qatar v International Marine Oil Company Ltd*,⁽²⁴¹⁾ and *Aramco v Government of Saudi Arabia*,⁽²⁴²⁾ in which the tribunals refused to apply the Shari'ah on the grounds that it did not contain a 'body of legal principles applicable to the construction of modern commercial instruments'.⁽²⁴³⁾ Ironically, according to Professor Fadlallah, the outcome in each case would have been the same even if the Shari'ah had been applied.⁽²⁴⁴⁾

vii. Authority to apply non-national law

3.194 The authority of an arbitral tribunal to apply a non-national system of law (such as the general principles of law or the *lex mercatoria*) will depend upon (a) the agreement of the parties, and (b) the provisions of the applicable law.

3.195 The Washington Convention, for example, is clear on this point. It states: 'The Tribunal shall decide a dispute in accordance with such *rules of law* as may be [page "226"](#) agreed by the parties.'⁽²⁴⁵⁾ The reference to 'rules of law', rather than to 'law' or 'a system of law' is a coded reference to the applicability of appropriate legal rules, even though these may fall short of being an established and autonomous system of law.

3.196 Within different States, different positions are adopted. France and Switzerland, for example, allow arbitrators to decide according to rules of law.⁽²⁴⁶⁾ By contrast, the Model Law, whilst leaving it to the parties to make an express choice of such '*rules of law*' as they wish, requires an arbitral tribunal, if the choice is left to the tribunal, to apply 'the law determined by the conflict of law rules which it considers applicable'.⁽²⁴⁷⁾ English law follows this approach: the arbitral tribunal has to decide the dispute (a) in accordance with the law chosen by the parties, or (b), if the parties agree, in accordance with 'such other considerations as are agreed by them or determined by the tribunal'; if there is no choice or agreement by the parties, the tribunal must apply 'the law' determined by the appropriate conflict rules.⁽²⁴⁸⁾ English courts have considered the meaning of 'such other considerations' under section 46(1)(b) of the 1996 Act in the following cases:

- (i) In *Musawi v R E International (UK) Ltd & Others*, the court held that section 46(1)(b) of the 1996 Act entitled the parties to the arbitration to require the *ayatollah* arbitrator to apply Shari'ah law as the applicable law.⁽²⁴⁹⁾
- (ii) In *Halpem v Halpem*,⁽²⁵⁰⁾ which concerned the application of Jewish law, the court ruled that if the seat of arbitration was England, then section 46(1)(b) of the 1996 Act would permit the tribunal to apply the parties' choice of some form of rules or non-national law to govern the merits of their dispute.⁽²⁵¹⁾

The meaning of 'such other considerations', nevertheless, is not yet entirely settled, and it is difficult to transpose interpretations from other jurisdictions where similar concepts may have different meanings. In Switzerland, for instance, *ex aequo et bono* is understood to mean the application of principles other than [page](#)

"227" legal rules while the concept of *amiable compositeur* requires the application of legal rules but allows arbitrators to moderate the effect of such rules. In France, on the other hand, the two concepts are given a similar meaning.

3.197 The ICC Rules, on the other hand, clearly go further than the Model Law (and the English Arbitration Act 1996);⁽²⁵²⁾ they not only allow the parties to choose the application of 'rules of law' to govern the dispute, but they also allow the arbitral tribunal, in the absence of an agreement by the parties, to apply 'the rules of law which it determines to be appropriate'. Thus, by confirming their ability to choose rules of law other than those of a single State, the rules confer greater flexibility on both the arbitrators and the parties.⁽²⁵³⁾

h. Equity and good conscience

3.198 Arbitrators may from time to time be required to settle a dispute by determining it on the basis of what is 'fair and reasonable', rather than on the basis of law. Such power is conferred upon them by so-called 'equity clauses' which state, for example, that the arbitrators shall 'decide according to an equitable rather than a strictly legal interpretation' or, more simply, that they shall decide as *amiabiles compositeurs*.

3.199 This power to decide 'in equity', as it is sometimes expressed, is open to several different interpretations. It may mean, for instance that the arbitral tribunal:

- should apply relevant rules of law to the dispute, but may ignore any rules which are purely formalistic (for example, a requirement that the contract should have been made in some particular form); or
- should apply relevant rules of law to the dispute, but may ignore any rules which appear to operate harshly or unfairly in the particular case before it; or
- should decide according to general principles of law; or
- may ignore completely any rules of law and decide the case on its merits as these strike the arbitral tribunal.

Commentators generally reject this fourth alternative. To the extent that they do agree, commentators seem to suggest that even an arbitral tribunal that decides 'in equity' must act in accordance with some generally accepted legal principles. In many (or perhaps most) cases this means, as indicated at the outset of this chapter, that the arbitral tribunal will reach its decision based largely on a consideration of the facts and on the provisions of the contract, whilst trying to ensure that  page "228" these provisions do not operate unfairly to the detriment of one or the other of the parties.

3.200 French law, for example, allows the arbitrators to act as *amiabiles compositeurs*, but requires them to satisfy certain standards:⁽²⁵⁴⁾ the Paris Cour d'Appel has held that 'arbitrators acting as *amiabiles compositeurs* have an obligation to ensure that their decision is equitable or else they would betray their duty and give rise to a cause for annulment'.⁽²⁵⁵⁾

3.201 For an 'equity clause' to be effective, there are in principle two basic requirements. First, that the parties have *expressly* agreed to it and, secondly, that it should be permitted by the applicable law. Both requirements are seen in such provisions as the UNCITRAL Rules that provide:

The arbitral tribunal shall decide as amiable compositeur or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

However, this is not universally true. Article 43 of the CIETAC Rules states that the tribunal shall 'independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness'. The latter reference to 'fairness and reasonableness' appears to give arbitrators the ability to decide cases according to principles of equity, rather than on the basis of a strict legal interpretation in accordance with the governing law of the contract.

3.202 The arbitration laws of some States go even further: they assume that the arbitrators will decide in equity unless it is expressly stated that they must decide in law. This recalls the time when arbitration was considered a 'friendly' method of dispute

resolution, rather than the law-based process it has become. If the arbitration is to take place in such a State, parties should take care to specify if they do not want the arbitrators to decide in accordance with principles of equity.⁽²⁵⁶⁾  [page "229"](#)

E. Conflict Rules and the Search for the Applicable Law

a. Introduction

3.203 As the previous discussion has endeavoured to make clear, parties to a contract are entitled to choose the law which is to govern their contractual relationship; and parties should exercise this entitlement with proper care and consideration, in any international commercial contract into which they may enter. In the event of a dispute, it may prove to be very valuable indeed.

3.204 The choices generally open to parties have been set out above. If disputes arise, and no choice of law has been agreed, it is difficult to make a proper assessment of the rights and obligations of the parties because there is no known legal framework within which to make this assessment.

3.205 If arbitration proceedings are commenced, one of the first tasks of the arbitral tribunal will be to do what the parties have failed to do, that is, to establish what law is applicable to the contract. In some cases, it might be appropriate for the arbitral tribunal to identify some non-national rule or custom to decide the issue in question as opposed to a national law.⁽²⁵⁷⁾ This search for the applicable substantive law may be a time-consuming and expensive process. The following section indicates how arbitrators are likely to approach the task, if obliged to do so. By way of general introduction, the Committee for International Commercial Arbitration of the ILA recently recognised the need for guidance and development of best practices for parties, counsel, and arbitrators in ascertaining the contents of the applicable law to an international commercial arbitration. The recommendations made in the ILA's Report, 'Ascertaining the Content of the Applicable Law in International Commercial Arbitration' are commended to arbitral tribunals with a view to facilitating uniformity and consistency in identifying the potentially applicable laws or rules.⁽²⁵⁸⁾

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b. Implied or tacit choice

3.206 In the absence of an express choice of law, the arbitral tribunal will usually look first for the law that the parties are presumed to have intended to choose. This is often referred to as a *tacit* choice of law. It may also be known as an implied, inferred, or implicit choice. There is a certain artificiality involved in selecting a substantive law for the parties and attributing it to their *tacit* choice, where (as often happens in practice) it is apparent that the parties themselves have given little or no thought to the question of the substantive law which is applicable to their contract.

3.207 The Rome Convention⁽²⁵⁹⁾ recognises this artificiality when it provides that a choice of law must be 'expressed or *demonstrated with reasonable certainty* by the terms of the contract or the circumstances of the case'.⁽²⁶⁰⁾ The Report by Professors Guiliano and Lagarde, which was published with the Convention, has a special status in the interpretation of the Convention.⁽²⁶¹⁾ The Report states that the parties may have made a real choice of law, although not expressly stated in their contract, but that the court is not permitted to infer a choice of law that the parties might have made, *where they had no clear intention of making a choice*.⁽²⁶²⁾

3.208 In such an event, the court—or the arbitral tribunal—will generally decide that the contract is to be governed by the law of the country with which it is most closely connected. It will be presumed that this is the country which is the place of business or residence of the party that is to effect the performance characteristic of the contract. However, this presumption does not apply if the place of characteristic performance cannot be determined. Indeed, it will be disregarded altogether if it appears that the contract is more closely connected with another country.⁽²⁶³⁾

3.209 In practice, as already indicated, parties to an international commercial contract would do well to make a specific choice of law, rather than leave the matter to be determined by a court or arbitral tribunal.

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c. Choice of forum as choice of law

3.210 One criterion for attributing a choice of law to the parties, in the absence of any express choice, is that based on a choice of forum by the parties. If the parties make no express choice of law, but agree that any disputes between them shall be litigated in a particular country, it is generally assumed that they intend the law of that country to apply to the substance of their disputes. This assumption is expressed in the maxim *qui indicem forum elegit jus*: a choice of forum is a choice of law.

3.211 The assumption makes sense when the reference is to a court of law. For instance, if the parties fail to put a choice of law clause into their contract but provide for the resolution of any disputes by the courts of New York, it would seem to be a reasonable assumption that they intended those courts to apply their own law—that is to say, the law of New York. The assumption is less compelling, however, when the dispute resolution clause provides for arbitration in a particular country, rather than litigation in the courts of that country. A place of arbitration may be chosen for many reasons, unconnected with the law of that place. It may be chosen because of its geographical convenience to the parties; or because it is a suitably neutral venue; or because of the high reputation of the arbitration services to be found there; or for some other, equally valid reason. In one case before the Arbitration Institute of the Stockholm Chamber of Commerce, the tribunal highlighted the fallacy of the principle that a choice of forum is a choice of law in the context of arbitration in the following terms:

[I]t is highly debatable whether a preferred choice of the *situs* of the arbitration is sufficient to indicate a choice of governing law. There has for several years been a distinct tendency in international arbitration to disregard this element, chiefly on the ground that the choice of the place of arbitration may be influenced by a number of practical considerations that have no bearing on the issue of applicable law.⁽²⁶⁴⁾

3.212 Nevertheless, where the parties have not made an express choice of the substantive law of their contract, but have included a reference to arbitration and have chosen the place of arbitration, that choice may influence the decision as to what the substantive law of the contract should be. First, the choice of a particular place of arbitration is sometimes taken as an implied choice of the law governing the contract.⁽²⁶⁵⁾ Secondly, the choice of a place of arbitration may be taken as an indicator that the arbitration clause itself is to be governed by the law of that place, irrespective of the law which governs the contract containing the arbitration clause. [page "232"](#) Thus, in a case where the choice of the substantive law of the contract was unenforceable, because it was too uncertain, but the arbitration clause was clear in its provision for arbitration in London, it was held that the arbitration agreement was a valid agreement and was governed by English law.⁽²⁶⁶⁾

d. Conflict rules

3.213 In the absence of an express choice by the parties, an arbitral tribunal is faced with the problem of choosing a system of law or a set of legal rules to govern the contract. It must first decide whether it has a free choice or whether it must follow the conflict of law rules of the seat of the arbitration—the conflict rules of the *lex fori*. Every developed national system of law contains its own rules for the conflict of laws (sometimes called private international law, in the narrower sense of that phrase). These conflict rules usually serve to indicate what law is to be chosen as the law applicable to a contract.

3.214 To carry out this role, the relevant conflict rules generally select particular criteria that serve to link or connect the contract in question with a given system of law. These criteria are often referred to as 'connecting factors'. However, they differ from country to country. Accordingly, the answer to the question 'What is the applicable law?' will also differ from country to country. Some of the rules that are applied to connect a particular contract with a particular national law or set of legal rules now look decidedly out of date. Under the conflict rules of some States, for instance, the applicable law (in the absence of an express or tacit choice) is likely to be the law of the place where the contract was concluded (the *lex loci contractus*). The place of conclusion of a contract may at one time have been a factor of some significance, since it would usually be the place of business or residence of one of the parties and might well also have been the place in which the contract was to be performed. However, with contracts being concluded nowadays by email or by fax, or by meetings at an airport or some other location,

the place in which the contract is finally concluded is often a matter of little or no significance.

3.215 A modern set of conflict rules is that adopted in the Rome Convention, which has already been discussed,⁽²⁶⁷⁾ and which provides at Article 4(1) that, in the absence of an express choice by the parties, 'the contract shall be governed by the law of the country with which it is most closely connected'.⁽²⁶⁸⁾ In this regard, there is a rebuttable presumption that the contract is most closely connected with the country  page "233" where the party who is to effect the 'performance characteristic of the contract' has its central administration, principal place of business, or other place of business through which the performance is to be effected.⁽²⁶⁹⁾

e. Does an international arbitral tribunal have a *lex fori*?

3.216 As already stated, conflict of law rules differ from one country to another. A judge or arbitral tribunal in one country may select the applicable law by reference to the place where the contract was made, whereas in another country it may be selected by reference to the law with which the contract has the closest connection. In short, the same question may produce different answers, depending upon where the judge or arbitral tribunal happens to be sitting.

3.217 In the context of international commercial arbitration, this is plainly unsatisfactory. The seat of the arbitration is invariably chosen for reasons that have nothing to do with the conflict rules of the law of the place of arbitration. This has led to the formulation of a doctrine that has found support both in the rules of arbitral institutions and in the practice of international arbitration, namely that, unlike the judge of a national court, an international arbitral tribunal is not bound to follow the conflict of law rules of the country in which it has its seat.

3.218 A leading commentator has spoken of 'the almost total abandonment of the application of the rules of conflict of the so-called arbitral forum',⁽²⁷⁰⁾ and the point was emphasised in the *Sapphire* arbitration where the tribunal commented that, unlike the judge of a national court, an international arbitral tribunal has no *lex fori*:

Contrary to a State judge, who is bound to conform to the conflict law rules of the State in whose name he metes out justice, the arbitrator is not bound by such rules. He must look for the common intention of the parties, and use the connecting factors generally used in doctrine and in case law and must disregard national peculiarities.⁽²⁷¹⁾

This was an early enunciation of what has come to be known as the 'direct choice' (*voie directe*) method of choosing the substantive law, which in reality gives arbitrators the freedom to choose as they please.

f. International conventions, rules of arbitration, and national laws

3.219 The Washington Convention states that, in the absence of any choice of the applicable or governing law of the contract by the parties, the arbitral tribunal must apply the law of the contracting State which is a party to the dispute, together  page "234" with such rules of international law as may be applicable.⁽²⁷²⁾ The Washington Convention, however, is necessarily concerned with States or State entities. Accordingly, it follows the traditional practice of giving considerable weight to the law of the *State* party to a contract, in the absence of any choice of law.

3.220 Other conventions are content to leave the choice to the arbitral tribunal. The European Convention of 1961, for instance, provides that: '[f]ailing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rules of conflict that the arbitrators deem applicable'.⁽²⁷³⁾ Although the European Convention of 1961 refers to 'rules of conflict', these are *not* necessarily the rules of conflict of the country in which the arbitration has its seat; on the contrary, the reference is to the conflict rules that the arbitrators deem applicable.

3.221 A similar approach is adopted in the UNCITRAL Rules, which state that failing any designation of the applicable law by the parties the arbitral tribunal shall apply 'the law determined by the conflict of laws rules which it considers applicable'.⁽²⁷⁴⁾

3.222 The Model Law adopts the same terminology.⁽²⁷⁵⁾ The intention is to make it clear that the arbitral tribunal is entitled to choose the governing law of the contract, in the absence of any express or implied choice of law by the parties themselves. In doing this, the arbitrators proceed objectively. But should they still be obliged to proceed by way of particular conflict rules? The point may be academic, since in practice an arbitral tribunal will seek to apply the law (or if permitted, the rules of law) which it considers to be appropriate. Whether this choice is reached through conflict rules, or more directly, may not matter. It should be noted, however, that French law omits any reference to conflict rules. This is both logical and sensible. French law states that:

The arbitrator shall settle the dispute in accordance with the rules which the parties have chosen, and in the absence of such a choice, in accordance with those rules which he considers to be appropriate.⁽²⁷⁶⁾

This provision contains two propositions. First, an international arbitral tribunal is not obliged to proceed to its choice of law by the adoption of any national conflict of laws rules. Secondly, it is not obliged to choose a *system* of law as the substantive law of the contract. It may, instead, choose such *rules* of law as it considers appropriate for the resolution of the dispute.⁽²⁷⁷⁾ The trail blazed by French [page "235"](#) law has since been followed by other countries, including, Canada, India, Kenya, and the Netherlands.⁽²⁷⁸⁾

g. Conclusion

3.223 In reaching its decision on the law to be applied in the absence of any choice by the parties, an arbitral tribunal is entitled (unless otherwise directed by the applicable rules or the *lex arbitri*) to select any of the systems or rules of law upon which the parties themselves might have agreed, if they had chosen to do so.

3.224 When it comes to determining how an arbitral tribunal should proceed to its decision, then once again (as so often in international commercial arbitration) no universal rule can be identified. Some systems of law insist that, in making its choice, an arbitral tribunal should follow the rules of conflict of the seat of the arbitration. This attitude looks increasingly anachronistic. The modern tendency is for international conventions and rules of arbitration to give considerable latitude to arbitral tribunals in making their choice of law, whilst still requiring them to do so by way of appropriate or applicable conflict rules. Some national laws (including the French, the Swiss, and the Dutch) carry the matter to its logical conclusion: by abandoning the reference to conflict rules altogether they allow an arbitral tribunal to decide for itself what law (or rules of law) the tribunal considers appropriate to settle the dispute.

3.225 This is an approach to be commended. If an arbitral tribunal can be trusted to decide a dispute, presumably it can be trusted to determine the set of legal rules by which it will be guided in reaching its decision. If the parties do not wish the arbitral tribunal to have such freedom of action, the remedy is in their own hands: they should agree upon the applicable law or set of legal rules, preferably in their contract but, if not, then at any time after the dispute has arisen. If this is not done, it will fall to the arbitral tribunal to make a decision that is likely to impact on the outcome of the arbitration. In order to reach this decision (which may be given as a ruling on a preliminary issue by way of an interim or partial award) the arbitral tribunal will usually have to consider detailed arguments of law and fact. This is an expense which could readily have been avoided, if the parties had taken the time and the trouble to agree on one of the many choices open to them. [page "236"](#)

F. Other Applicable Rules and Guidelines

3.226 In addition to applicable laws selected by the parties, participants in the arbitral process must have regard to the proliferating professional and non-national rules and guidelines that one author has entitled the 'procedural soft law' of international arbitration.⁽²⁷⁹⁾ These rules and guidelines can guide participants on important matters such as: the taking of evidence in international arbitration,⁽²⁸⁰⁾ conflicts of interest in international arbitration,⁽²⁸¹⁾ and ascertaining the applicable substantive law.⁽²⁸²⁾ Commentators are divided as to the merits of such proliferating guidelines, with some welcoming a development that reduced arbitrators' ability to 'impose their own peculiarities' on the process,⁽²⁸³⁾ while others bemoan a development that they say will increase the 'judicialisation' of arbitration.⁽²⁸⁴⁾ Whichever position one takes in

this debate, it is undeniable that participants in the international arbitral process are placing increasing reliance on such guidelines.

a. Ethical rules

3.227 Much has been said and written about the duties to which arbitrators are subject (and this is indeed the subject of Chapter 5). But what of arbitration practitioners who appear as counsel in international arbitrations, often outside their home jurisdictions? A lawyer appearing in a court action before his own local courts will clearly be subject to the rules of professional ethics of his local bar. But what if he practises outside his home jurisdiction? And what if he is appearing in an arbitration? And what if that arbitration is taking place in yet a different jurisdiction? Will the lawyer remain subject to his local bar rules? Will he also be subject to the ethical rules applying to lawyers practising in the jurisdiction in which he is now based? Will he also be subject to the ethical rules applying to lawyers conducting legal proceedings in the place of arbitration, if different?

3.228 The answers to these myriad questions can have a significant impact on the conduct of the arbitration. Let us take, for example, the question of how much contact a lawyer should have with a witness prior to a hearing. In some jurisdictions, for example England, it is impermissible for a lawyer to 'coach' a witness on [page "237"](#) the evidence to be given at a hearing.⁽²⁸⁵⁾ In others, for example the Netherlands, constraints on lawyers appear to be far more limited.

3.229 Reconciling these different rules and requirements is seldom straightforward, particularly if one is appearing against counsel who may be subject to different (and less stringent) ethical requirements. For now, however, there appears to be no alternative for counsel but to ascertain the answers to the following questions:

- (i) Am I subject to my professional bar rules when I am acting in an arbitration, and even when I am acting in an arbitration abroad?⁽²⁸⁶⁾
- (ii) If I am practising abroad, am I also subject to the professional ethical rules of the jurisdiction in which I am practising?
- (iii) If the seat of the arbitration is in a third jurisdiction, am I also subject to the ethical rules of a third bar?

The authors say 'for now', because some commentators have for some time posited the possibility of a harmonization of professional bar rules so far as they apply to practitioners in international arbitration.⁽²⁸⁷⁾ The idea is attractive, particularly for those concerned to ensure that the playing field for the participants in international arbitration is level. However, the changes necessary to achieve this should not be underestimated, requiring national bar rules around the world to make express exceptions to their general codes so far as practitioners in arbitral proceedings are concerned.⁽²⁸⁸⁾ If such changes are to happen at all, they are unlikely to happen quickly.

b. Rules, guidelines, and recommendations

3.230 One of the recognised advantages of international arbitration is the flexibility that results from the paucity of rules (and the corresponding preponderance of discretion) that enables arbitrators to tailor proceedings precisely to the characters, cultures, and claims that feature in any particular arbitration. Thus, every [page "238"](#) international arbitration—at least in theory—is a microcosm of potential procedural reform. That potentiality is undoubtedly a quality of the arbitral process; but that quality has a price—procedural unpredictability. And it is a price that many in the expanding constituency of arbitration users are increasingly unwilling to pay.

3.231 To address this unpredictability, in recent years the world of international arbitration has seen the steady growth of procedural rules, guidelines, and recommendations that now occupy a prominent place in the practice of international arbitration. In this regard, another commentator has referred to the growth during the last decade of the procedural 'soft law' of international arbitration.⁽²⁸⁹⁾ And that growth has indeed been quite remarkable. By way of notable example: in 1996, UNCITRAL published its detailed 'Notes on Organising Arbitral Proceedings'; in 1999, the International Bar Association's Arbitration and ADR Committee D revised its now ubiquitous Rules on The Taking of Evidence in International Arbitration; in 2004, the same IBA Committee D published its Guidelines on Conflicts of Interest in International Arbitration; in 2006, the American College of Commercial Arbitrators developed a compendium of Best Practices for Business Arbitration;

and in 2008, the International Law Association's Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration.

3.232 Many of these rules, guidelines, and recommendations will now feature prominently—side-by-side with the applicable laws—in the conduct of international arbitrations, and are referred to where appropriate throughout the subsequent chapters of this book.

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¹ Lord McNair, former President of the ICJ, 'The General Principles of Law Recognised by Civilised Nations' (1957) 33 BYIL 1, at 7.

² The lead is given by the [Model Law which states categorically \(in Art 5\)](#) that '[i]n matters governed by this Law, no court shall intervene except where so provided in this Law'. Even States that have not adopted the Model Law per se have thought it appropriate to make a similar statement—for instance, Swiss law states that its courts will 'decline jurisdiction' where there is an agreement to arbitrate, except in limited circumstances: [Art 7 of Swiss Private International Law Act 1987](#).

[The Swedish Arbitration Act 1999](#) contains a similar provision, at s 4, although ss 5 and 6 contain exceptions to this rule; and the [Spanish Arbitration Act 2003](#), which is based on the Model Law with significant changes, states unequivocally that '[i]n matters governed by this Act, no court shall intervene except where so provided in this Act' (Art 7).

³ What some have referred to as the procedural 'soft law' of international arbitration. See Professor Park, 'The Procedural Soft Law of International Arbitration: Non-Governmental Instruments', in Mistelis and Lew, *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 141–154.

⁴ See [Ch 11](#).

⁵ See below [para 3.15](#), as well as the observations by the English courts in [Tamil Nadu Electricity Board v ST-CMS Electric Company Private Limited \[2007\] EWHC 1713 \(Comm\)](#). In this case, the English courts considered the scope of an arbitration agreement governed by English law between two Indian companies. The underlying contract for the supply of electricity (the PPA) was governed by Indian law (and was to be performed in India) but provided for arbitration in London in accordance with English law. It was decided that '[t]he parties have agreed to arbitration in accordance with English law and it is by that law alone that the ambit of the arbitration provision can be determined, as a matter of construction. To delve into the proper law of the PPA to seek for any provision mandatorily applicable by that law to the issue of jurisdiction is impermissible'. Stressing that arbitration agreements are to be regarded as separate contracts under [s 7 of the English Arbitration Act 1996](#), the court held that the arbitration agreement was governed by English law and would take no account of any changes in the substantive law of India (being the proper law of the underlying contract), unless English public policy also required it.

⁶ For an in-depth discussion of this issue, see [Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause', ICCA Congress Series No 14, 1998, Paris, para 136](#).

⁷ eg in [Union of India v McDonnell Douglas Corp \[1993\] 2 Lloyd's Rep 48](#), the court stated: 'An arbitration clause in a commercial contract like the present one is an agreement inside an agreement ... The parties may make an express choice of law to govern their commercial bargain and that choice may also be made of the law to govern the agreement to arbitrate. In the present case it is my view that by Art 11 the parties have chosen the law of India not only to govern the rights and obligations arising out of their commercial bargain but also the rights and obligations arising out of their agreement to arbitrate.'

⁸ [Lew, n 6 above](#). It could also be seen as an *express* choice, if the arbitration clause is considered as simply one of the rights and obligations assumed by the parties in their contract, to be governed by the law which governs that contract.

⁹ Derains, *The ICC International Court of Arbitration Bulletin*, Vol 6, No 1, 10, at 16–17.

¹⁰ Separability is discussed in [Ch 2](#). See [Fiona Trust & Holding Corporation & Ors v Privalov & Ors \[2007\] EWCA Civ 20 \(24 January 2007\)](#); and [Fili Shipping Co Ltd v Premium Nafta Products Ltd \(on appeal from Fiona Trust and Holding Corp v Privalov\) \[2007\] UKHL 40](#).

¹¹ [New York Convention, Art V\(1\)\(a\)](#). There is a similar provision in the [Model Law, at Art 34\(2\)\(a\)](#).

¹² [2007] EWHC 1541 (Comm).

- 13 This confirmed the statement of the court in *A v B (No 2)* that 'the whole structure of the supervisory jurisdiction of the seat of an international arbitration would be completely undermined' if the courts of the seat did not have exclusive jurisdiction to oversee arbitrations in its jurisdiction, [2007] 1 Lloyd's Rep 358, at 563. For the significance of the seat of arbitration, see also *Weissfisch v Julius* [2006] 1 Lloyd's Rep 716 (CA); and *West Tankers v RAS (the Front Comor)* [2007] 1 Lloyd's Rep 391.
- 14 [2000] 2 Lloyd's Rep 500.
- 15 [2007] EWHC 25322.
- 16 Per the then Mustill J, [1981] 2 Lloyd's Rep 446, at 483.
- 17 *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc (2001) XXVI Ybk Comm Arb 291*, Swedish Supreme Court, 27 October 2000, Case No T1881-99. It should be noted that the Swedish Arbitration Act 1999 provides, in s 48, that where an arbitration agreement has an international connection, and the parties have not agreed upon a choice of law, the arbitration agreement will be governed by the law of the seat of the arbitration.
- 18 *Matemaco SA v PPM Cranes Inc (2000) XXV Ybk Comm Arb*, 20 September 1999, Tribunal de Commerce, Brussels.
- 19 Zekos, 'Problems of Applicable Law in Commercial and Maritime Arbitration' (1999) 16 (4) J Int Arb 173.
- 20 *Pedcor Mgt Co Inc Welfare Benefit Plan v N Am Indemnity*, 343 F 3d 355 (5th Cir 2003).
- 21 *Milos Sovak and Biophysica Inc v Chugai Pharmaceutical Co*, 289 F 3d 615 (9th Cir 2002).
- 22 *Chloe Z Fishing Co Inc v Odyssey Re*, 109 F Supp 2d 1236 (SD Cal 2000).
- 23 *Ibid* at 1253.
- 24 *Municipalité de Khoms El Mergib c/ Sté Dalico*, Cass. Civ. 1ère, 20 December 1993, Rev arb. 1994, 116; translation by Professor Gaillard in *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, eds. 1999), para 437. The case was brought by a Libyan municipal authority against a Danish contractor, after the latter had initiated arbitration proceedings. The Libyan party argued that the arbitration agreement was governed by Libyan law and that it was invalid under Libyan law. The Paris Cour d'Appel rejected these arguments without deciding what law applied.
- 25 Professor Gaillard refers to the 'dual meaning' of 'autonomy', n 24 above, para 388; see generally paras 420-421 and 435-451, and in particular 441 for an endorsement of the French third way. Regarding the separability of the arbitration agreement from the main contract under French law, see *Sté Omenex c/ Hugon*, Cass. Civ. 1ère, Revue de l'Arbitrage, 2006—No 1 (2006), 103-105, which held that an arbitration agreement survives the invalidity of the underlying agreement.
- 26 Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), para 6-66.
- 27 *Uni-Kod c/ Sté Ouralkali*, 30 March 2004, Cass. Civ. 1ère, Revue de l'Arbitrage, 2005, 959.
- 28 A study into corporate attitudes on international arbitration has shown that factors such as neutrality, as well as geographical convenience and proximity to evidence and witnesses are key to parties' choice of the place of arbitration. See PricewaterhouseCoopers and the Queen Mary School of International Arbitration, University of London's 'International Arbitration: Corporate Attitudes and Practice (2006)', available at [http://www.pwc.com/extweb/pwcpublishations.nsf/docid/B6C01BC8008DD57680257171003177F0/\\$file/pwc_IA_S...](http://www.pwc.com/extweb/pwcpublishations.nsf/docid/B6C01BC8008DD57680257171003177F0/$file/pwc_IA_S...) See also *dicta* by Lord Hoffman in delivering the leading judgment for the House of Lords in *West Tankers v RAS (the Front Comor)* n 13 above, at para 12: in the case of arbitration, 'the situs and governing law are generally chosen by the parties on grounds of neutrality, availability of legal services and the unobtrusive effectiveness of the supervisory jurisdiction'.
- 29 Gaillard, n 24 above para 1428. Early recognition of this principle in English law may be seen in *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 572 at 604.
- 30 For choice of place, see above, para 3.34 and n 28.
- 31 For choice of law, see above, para 3.12.
- 32 UNCITRAL Rules, Art 16(1).
- 33 ICC Rules, Art 14.1.
- 34 *Ibid*, Art 9.5.
- 35 Under s 48 of the Swedish Arbitration Act 1999, eg, where parties have not chosen a substantive law to govern their contract, it will be governed by the law of the seat of the arbitration. This situation is discussed later in this chapter.
- 36 The reference was to the second edition of this book.
- 37 *Smith Ltd v H International* [1991] 2 Lloyd's Rep 127, at 130.
- 38 Swedish Arbitration Act 1999, s 6. (For an English translation of the Act, see (2001) 17 Arb Intl 426; and for commentaries on the Act, *ibid*, throughout.)

- ³⁹ [Swedish Arbitration Act 1999, s 37.](#)
- ⁴⁰ [Ibid, s 41.](#) It is an unattractive proposition for arbitrators whose work has been accomplished and whose role is over, to face a possible challenge before the local courts in relation to their fees.
- ⁴¹ [Swiss Private International Law Act 1987.](#)
- ⁴² [French Code of Civil Procedure, Book IV, Title V—International Arbitration.](#)
- ⁴³ Colombia's Law 315 of 12 September 1996 on International Arbitration (now consolidated in Decree 1818/98) consists of just five articles and states at Art 2: 'All matters relating to international arbitration shall be governed by this Law and, in particular, by the provisions of treaties, conventions and protocols and other international agreements signed and ratified by Colombia, which shall prevail over the provisions of the Code of Civil Procedure.'
- ⁴⁴ See [Ch 1.](#)
- ⁴⁵ [Model Law, Art 19.](#)
- ⁴⁶ See, eg, the [Swiss Private International Law Act 1987, Ch 12, Art 183](#), which provides that the arbitral tribunal may request the assistance of the court where a party does not voluntarily comply with a protective measure; the [Netherlands Arbitration Act 1986, Art 1022\(2\)](#), which provides for a party to request a court to grant interim measures of protection; the [English Arbitration Act 1996, s 44\(1\) and \(2\)](#), which gives the court the same powers to order the inspection, photocopying, preservation, custody, or detention of property in relation to an arbitration as it has in relation to litigation; and the [Model Law, Art 9](#), which allows a party to seek interim measures of protection from a court. It should be noted that while the courts of the seat play the lead role in supporting the arbitral process *inter alia* in terms of granting interim relief, it may also be necessary to seek relief from other courts beyond the seat, where, for instance, assets might be located. Various national laws (for example Dutch and German law) foresee this possibility and courts in various other jurisdictions including Hong Kong and India have intervened in support of arbitrations being conducted overseas; see [The Lady Muriel \[1995\] 2 HKC 320 \(CA\)](#) and [Bhatia International v Bulk Trading SA \[2002\] 4 SCC 105](#) respectively.
- ⁴⁷ [The Netherlands Arbitration Act 1986 provides in Art 1046](#) that related arbitral proceedings before another arbitral tribunal in the Netherlands may be consolidated by order of the court notwithstanding the objection of one of the parties unless the parties have agreed otherwise. British Columbia has adapted the [Model Law, in s 27\(2\) of the International Commercial Arbitration Act 1996](#), to allow court-ordered consolidation where the parties to two or more arbitration agreements have agreed to consolidate the arbitrations arising out of those agreements.
- ⁴⁸ [See Ch 2, para 2.52.](#)
- ⁴⁹ Toope, *Mixed International Arbitration* (Grotius Publications, 1990), 41 (emphasis added).
- ⁵⁰ See [Ch 8 at para \[\]](#).
- ⁵¹ See, eg, Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 21; Jarvin, 'Le Lieu de l'arbitrage' (1993) ICC Bulletin, Vol 4, No 2, 7; [Born, International Commercial Arbitration \(Kluwer Law International, 2001\), 573](#); and [Kaufmann-Kohler, 'Identifying and Applying the Law Governing the Arbitral Procedure—the role of the place of arbitration' in ICCA Congress Series No 9, 1999](#), entitled 'Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention', 336, who states '... to identify the law applicable to the arbitration procedure, one must define the place of arbitration ...'
- ⁵² 1923 Geneva Protocol, Art 2 (emphasis added).
- ⁵³ Which, by Art VII(2), replaces the 1923 Geneva Protocol to the extent that contracting States become bound by the [New York Convention](#).
- ⁵⁴ [New York Convention, Art V\(1\)\(d\).](#)
- ⁵⁵ [Ibid, Art V\(1\)\(a\) and \(e\).](#)
- ⁵⁶ [Model Law, Art 1\(2\); Arts 8 and 9](#) are concerned with enforcing the arbitration agreement and interim measures of protection respectively; [Arts 35 and 36](#) are concerned with recognition and enforcement of the award.
- ⁵⁷ [Swiss Private International Law Act 1987, Ch 12, Art 176\(1\)](#) (emphasis added).
- ⁵⁸ [English Arbitration Act 1996, s 2.](#)
- ⁵⁹ [Ibid, s 3.](#)
- ⁶⁰ [Ibid, s 52\(5\).](#)
- ⁶¹ Reymond, 'Where is an Arbitral Award made?' (1992) 108 LQR 1 at 3. As indicated at para 3.55, there is no such 'curial' law in ICSID arbitration proceedings. In accordance with [Art 62 of the ICSID Convention](#), the place of the proceedings is the seat of the centre unless otherwise agreed but this does not impose the curial law of Washington, DC.
- ⁶² By the present authors, in the second edition of this book.

63 [Union of India v McDonnell Douglas Corp](#) [1993] 2 Lloyd's Rep 48. (The Peruvian case referred to in this citation is generally known as 'the Peruvian Insurance case'.)

64 [Art 14](#).

65 [Art 14](#).

66 [Art 16](#).

67 [Art 16](#).

68 [Model Law, Art 20\(2\)](#). The Netherlands Arbitration Act 1986, [Art 1037\(3\)](#) is to like effect. But contrast the law in the US that requires that hearings be conducted in the place of the arbitration unless the parties agree otherwise: *Spring Hope Rockwool v Industrial Clean Air Inc*, 504 F Supp 1385 (1981); *Snyder v Smith* 736 F 2d 409 (7th Cir 1984), cert denied, 469 US 1037 (1984); *Jain v de Méré* 51 F 3d (7th Cir 1995), 686, 692.

69 This was the case in *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 (CA), in which it was held that there was no legal nexus between the arbitration and Singapore just because hearings were held there.

70 The local law, for example, may not permit arbitrators to take evidence from witnesses on oath.

71 The preceding two paragraphs were cited with approval by the court in the [Peruvian Insurance case, which is referred to at n 63](#).

72 In ICC Case No 10623 the tribunal held all meetings etc in Paris, although the seat of the arbitration was in Ethiopia. The Ethiopian Government, a party to the arbitration, contested the tribunal's jurisdiction both by challenging it unsuccessfully before the ICC Court and by applying to its local courts, the interference of which the tribunal ignored (ASA Bulletin, Vol 21 No 1 (2003), 60 including summary by Professor Crivellaro; interference by local courts is further discussed at [para 3.98](#)). See also the [decision of the Svea Court of Appeal in Titan Corporation v Alcatel CIT SA](#), in which the court denied jurisdiction to consider an *ex parte* application to set aside an award which stated that the seat of arbitration was Stockholm. The court based its decision in part on the fact that the hearings had taken place in Paris and in London, and not in Stockholm, and hence, in its view, the arbitration could not be considered to have any connection to Sweden as required for the [Swedish Arbitration Act to apply \(\(2005\) XXX Ybk Comm Arb 139\)](#).

73 Another good reason for not labelling the *lex arbitri* as 'procedural' is that different countries have different notions of what is a matter of procedure and what is a matter of substance: cf the treatment of time limits in English law, discussed in [Ch 4, para 4.04](#).

74 See, for instance, the reference of Lord Diplock to the 'selection' of a particular *lex arbitri* by the choice of a place of arbitration, in the *Compagnie Tunisienne* case cited above at n 29.

75 The English Technology and Construction Court in [Braes of Doune Wind Farm \(Scotland\) v Alfred McAlpine Business Services](#) [2008] EWHC 426 (TCC) stated that the parties' designation of 'Glasgow, Scotland' as the place of arbitration referred only to the place that it was intended to hold hearings. England was deemed to be the juridical seat due to the fact that the parties had referred to the application of the [English Arbitration Act 1996](#). This case demonstrates that the parties' choice of procedural law may be determinative of the seat of the arbitration. According to the court: 'one needs to consider what, in substance, the parties agreed was the law of the country which would juridically control the arbitration.'

76 See [Ch 6](#).

77 Eg consolidation under Dutch law; and the mandatory provisions of other national laws governing arbitration, such as the mandatory provisions of the [English Arbitration Act 1996](#).

78 [Swiss Private International Law Act 1987, Ch 12, Art 182](#); there are provisions in Dutch and Italian law to the same effect and in the [French New Civil Code at Art 1494\(1\)](#). However, non-compliance with public policy rules would be a ground for setting an award aside, even if another procedural law was chosen.

79 [Swiss Private International Law Act 1987, Ch 12, Art 182\(3\)](#).

80 In many countries an arbitrator has no power to issue a *subpoena* and the parties must rely upon the relevant court for such process. See, eg, the [Model Law, Art 27](#). The US does allow for an arbitrator to summon a witness to attend and to bring any material documents or evidence. But the local Federal District Court must be called in aid to assist in compelling a reluctant witness to attend or to punish a witness who fails to attend (Federal Arbitration Act 1925, s 7). See [Ch 7](#).

81 [Naviera Amazonia Peruana SA v Compania Intemacional de Seguros de Peru](#) [1988] 1 Lloyd's Rep 116.

82 [Ibid.](#) at 120.

83 [New York Convention, Art V\(1\)\(a\)](#); [Model Law, Art 36\(1\)\(a\)\(i\)](#).

84 [New York Convention, Art V\(1\)\(e\)](#); [Model Law, Art 36\(1\)\(a\)\(v\)](#).

Note that these provisions are discretionary: recognition and enforcement may be refused: see [Ch 10](#).

85 [ICC Rules, Art 25.3](#).

⁸⁶ [Model Law, Art 31\(3\)](#).

⁸⁷ [Netherlands Arbitration Act 1986, Art 1037\(1\)](#).

⁸⁸ [English Arbitration Act 1996, ss 52\(5\) and 53](#).

⁸⁹ [Mann, 'Where is an award "made"?' \(1985\) 1 Arb Intl 107, at 108](#).

However, the view of Dr Mann that an award is 'made' at the arbitral seat and not necessarily at the place where it is signed was not accepted in [Hiscox v Outhwaite \[1992\] AC 562](#).

⁹⁰ In [ibid at 594](#), where the arbitration was conducted in London, but the award was signed in Paris.

⁹¹ [English Arbitration Act 1996, s 3](#).

⁹² Egypt, eg, has adopted the [Model Law](#) but has added a provision which provides for annulment if the award fails to apply the law agreed by the parties—thus opening the way for the Egyptian courts to review awards on issues of law, which is not permitted under the Model Law. For an authoritative commentary on the Egyptian Code see [Atallah, 'The 1994 Egyptian Arbitration Law Ten Years On', ICC Bulletin, Vol 14, No 2, Autumn 2003, 16 and 17](#). In Latin America, while several States have now adopted the Model Law with limited modifications (Bolivia, Chile, Guatemala, Nicaragua, Paraguay, Peru and Venezuela), Brazil and Costa Rica chose to tinker with the Model Law's formulation and have added their own customised elements.

⁹³ This was the view of the Mustill Committee, which recommended that the Model Law should not be adopted, but that the English law of arbitration should nevertheless take careful account of it—as has been done, in [the Arbitration Act 1996](#).

⁹⁴ See for instance the preface to Mustill and Boyd, *Commercial Arbitration* (2001 Companion Volume to the 2nd edn (Butterworth, 2001) which states: 'The Act has however given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities ... have been replaced by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature.'

⁹⁵ See in [particular Law, 'Achieving the Dream: Autonomous Arbitration' \(2006\) 22 Arb Intl 178, at 202](#); Fouchard, *L'Arbitrage Commercial International* (Litec, 1965), 22–27; Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358; and Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why it Matters' (1983) 32 ICLQ 53. For a continuation of the debate see Nakamura, 'The Place of Arbitration—Its Fictitious Nature and *Lex arbitri*' 15(10) Mealey's Intl Arb Rep 23–29 (October 2000); Rubins, 'The Arbitral Seat is No Fiction: A Brief Reply to Tatsuya Nakamura's Commentary, "The Place of Arbitration—Its Fictitious Nature and *Lex arbitri*"' 16(1) Mealey's Intl Arb Rep 23–28 (January 2001); Pinsolle, 'Parties to An International Arbitration With the Seat in France are at Full Liberty to Organise the Procedure as They See Fit: A Reply to the Article By Noah Rubins' 16(3) Mealey's Intl Arb Rep 30 (2001); and Nakamura, 'The Fictitious Nature of the Place of Arbitration May not Be Denied' 16(5) Mealey's Intl Arb Rep (2001).

⁹⁶ [Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnuqotia Est Epices \(2007\) Revue de l'Arbitrage 507](#).

⁹⁷ In this discussion, 'delocalisation' is used (as it originally was) to signify the detachment of international commercial arbitration from control by the law of the place of arbitration. Somewhat confusingly, the term is now sometimes used to indicate not only detachment from the *lex arbitri* but also the replacement of a national law governing the substance of the dispute by general principles or some other non-national concept: see, for instance, Toope, n 49 above, who, at 19, states: 'Some [specialists] would preclude the delocalisation of procedure, but allow delocalisation of the substantive law, through the application of "general principles", "a *lex mercatoria*" or international law *per se*.'

⁹⁸ See Fouchard, n 95 above.

⁹⁹ The point is no doubt so obvious as to need no comment, but the statement of Professor Weil seems particularly apt in this context: '[t]he principle of *pacta sunt servanda* and that of party autonomy do not float in space; a system of law is necessary to give them legal force and effect' (Weil, 'Problèmes relatifs aux contrats passés entre un état et un particulier' (1969) 128 Hague Recueil 95 at 181 (authors' translation)).

¹⁰⁰ See [para 3.80 and n 103 below](#).

¹⁰¹ [Art V\(1\)\(a\) and \(e\)](#).

¹⁰² [Art 36.1\(a\)\(i\) and \(v\)](#).

¹⁰³ The original authors commented, in the second edition of this book, that claimants would no doubt welcome the 'hands-off' attitude of the Belgian legislature but that respondents were likely to be less

enthusiastic and their lawyers might be expected to advise against Belgium as a suitable place for arbitration. This has proved to be the case. Belgian law now allows parties to an international arbitration to opt out of local control if they wish, but no longer provides for compulsory delocalisations: Law of 19 May 1998.

¹⁰⁴ *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, [1983] 3 All ER 428 (CA).

¹⁰⁵ See the [Model Law, Art 6](#) (which allocates various functions to the local courts) and [Art 34](#) (which allows the local court to set aside awards made in its territory, on certain limited grounds).

¹⁰⁶ [2007] EWCA Civ 291.

¹⁰⁷ [See Ch 2.](#)

¹⁰⁸ [Brower, Brower II, and Sharpe, 'The Coming Crisis in the Global Adjudication System' \(2003\) 19 Arb Intl 424.](#)

¹⁰⁹ See, eg, [Himpuna California Energy Ltd v Republic of Indonesia, XXV YBCA \(2000\), 11–432](#), in which the Tribunal, in its Interim Award dated 26 September 1999, ruled that an injunction (ordered by the Central District Court of Jakarta that arbitral proceedings be suspended) was 'the consequence of the refusal of the Republic of Indonesia to submit to an arbitration to which it [had] previously consented [and] therefore [it did] not, under Art 28 of the UNCITRAL Rules [on the submission of evidence], excuse the Republic of Indonesia's default' (at 176). See also ICC Case No 10623, n 72 above.

¹¹⁰ In particular, see paras [7.52–7.62](#).

¹¹¹ In English private international law, it is also known as the 'proper law' of the contract.

¹¹² [Compagnie Tunisienne, n 29 above, at 603](#), per Lord Diplock.

¹¹³ *Kahler v Midland Bank Ltd* [1950] AC 24, at 56. Similar problems have arisen in Argentine investments where obligations payable in foreign currency were forcibly redenominated in Argentine pesos at a rate of one dollar to one peso. This applied only to contracts governed by Argentinian law.

¹¹⁴ The point as to 'relevant rules', by which is meant something other than a national system of law, is developed below. The [Model Law](#) (and the [UNCITRAL Rules](#)) allows the parties to choose the 'rules of law' applicable to their contract (which may include, for instance, the *lex mercatoria*) but stipulates that if the parties fail to make such a choice, the arbitral tribunal shall apply 'the law' applicable to the dispute (which would not include the *lex mercatoria*). This same dichotomy is to be found in national systems of law, including English and Swiss (the latter being helpfully discussed in Tschanz, *International Arbitration in Switzerland* (Helbing Lichtenhahn, 1989), 117 *et seq*). However, French law does allow an arbitrator to choose 'appropriate' rules of law.

¹¹⁵ See, eg, Brazilian Arbitration Act 1996, Art 2; China New Interpretation, Art 16; [English Arbitration Act 1996, s 46\(1\)](#); [French Code of Civil Procedure, Art 1496](#); [German ZPO 1998, Art 1051\(10\)](#); Indian Arbitration Ordinance 1996, s 28(10)(b); [Russian International Arbitration Law 1993, Art 28](#); and [Swiss Private International Law Act 1987, Art 187\(1\)](#).

¹¹⁶ *Lew, Applicable Law in International Commercial Arbitration* (Oceana Publications and Sighoff & Noorthoff, 1978), 75.

¹¹⁷ The Rome Convention on the Law Applicable to Contractual Obligations may be found in [1980] Official Journal of the European Union, No L266/1.

¹¹⁸ *Ibid*, Art 3, para 1. The Convention does not apply to arbitration agreements, but the subject under discussion here is not that of arbitration agreements but of the contract between the parties under which a dispute has arisen.

¹¹⁹ [Washington Convention, Art 42.](#)

¹²⁰ [UNCITRAL Rules, Art 33.1.](#)

¹²¹ Other examples include AAA [ICDR Art 28\(1\)](#); [LCIA Rules Art 22\(3\)](#); Russian Federation CCI, s 13(1); Stockholm Institute Art 24(1); and [WIPO Arbitration Rules Art 59\(1\)](#).

¹²² [ICC Rules, Art 17.1](#). The reference to 'rules of law' marks a shift in thinking from the previous (1988) version of the ICC Rules, which referred simply to the 'law' to be applied.

¹²³ Lalive, cited in Lew, 87, n 116 above.

¹²⁴ The Rome Convention, Art 3, provides that a choice of law, or a variation of a choice, can be made at any time after the conclusion of the contract by agreement between the parties.

¹²⁵ See Moss, 'Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?' *Stockholm Intl Arb Rev* 2005: 1.

¹²⁶ By way of illustration of the point, the ECJ in [Eco Swiss China Ltd v Benetton International NV](#) ruled that a breach of EU competition law constitutes a violation of the *ordre public* ([1999] ECR I–3055, also published in Mealey's Intl Arb Rep, Vol 14, Issue 6, June 1999, B-1). In [Marketing Displays International Inc v VR Van Raalte Reclame BV, 29 \(Judgment of 24 March 2005, Case No 04/694 and 04/695\)](#) the Dutch Court of Appeal upheld a lower court's

- refusal to grant *exequatur* to three US arbitral awards, because the awards were considered incompatible with Art 81 of the EC Treaty and thus violated public policy.
- ¹²⁷ [\[1999\] QB 785](#).
- ¹²⁸ [Ibid. at 800](#).
- ¹²⁹ Which in this context will be referred to as a 'national' system of law, the term being intended to cover not merely a 'national law' properly so called, such as that of France, but also the law of a 'state' within a federal system such as New York or California.
- ¹³⁰ *Sapphire International Petroleum Ltd v The National Iranian Oil Company* (1964) 13 ICLQ 1011, at 1012.
- ¹³¹ *Texaco* arbitration, n 163 below.
- ¹³² See, in particular, Rigaux, 'Des dieux et des héros: Réflexions sur une sentence arbitrale' (1978) *Revue Critique de droit international privé* 435; and Stern, 'Trois arbitrages, un même problème, trois solutions' (1980) *Revue de l'Arbitrage* 3–43.
- ¹³³ See [para 8.55](#).
- ¹³⁴ The *Liamco* arbitration (1981) VI Ybk Comm Arb 89, at 104 and 113. For further discussion of the three Libyan oil nationalisation arbitrations see Greenwood, 'State Contracts in International Law—The Libyan Oil Arbitrations' (1982) 53 BYIL 27.
- ¹³⁵ *American Independent Oil Company Inc (Aminoil) v Government of the State of Kuwait* [1982] 21 ILM 976, separate opinion of Sir Gerald Fitzmaurice QC at 1027.
- ¹³⁶ For further discussion of stabilisation clauses see, eg, Wetter, *The International Arbitral Process: Public and Private* (Oceana Publications, 1979), Vol 1, 407; Toope, n 49 above, 52 *et seq*; Nassar, *The Sanctity of Contracts Revisited* (1994); Bernardini, 'Stabilization and adaptation in oil and gas investments' (2008) *Journal of World Energy Law & Business* 98; Maniruzzaman, 'The pursuit of stability in international energy investment contracts: A critical appraisal of the emerging trends' (2008) *Journal of World Energy Law & Business* 121; Cotula, 'Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink of stabilization clauses' (2008) *Journal of World Energy Law & Business* 158. For an example of a stabilisation clause in an LNG contract that worked against the party which it was intended to protect, see Gaillard, 'The role of the arbitrator in determining the applicable law' in *The Leading Arbitrators' Guide to International Arbitration* (Juris Publishing, 2004), 186.
- ¹³⁷ On how stabilisation clauses may have helped create a secure and favourable legal regime and thereby encourage investment, see, eg, the Nigerian Liquefied Natural Gas Venture, discussed by Rawding, 'Protecting Investments under State Contracts: Some legal and ethical issues' 99 *Arb Intl* 341.
- ¹³⁸ [Aminoil, n 135 above](#).
- ¹³⁹ See *Stabilization Clauses and Human Rights—A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights* (2008) at <http://www.ifc.org>.
- ¹⁴⁰ See Al Faruque, 'Typologies, Efficacy, and Political Economy of Stabilisation Clauses: A Critical Appraisal', TDM Vol 4, Issue 5 September 2007, Maniruzzaman, 'Damages for Breach of Stabilisation Clauses in International Investment Law: Where do We Stand Today?' [2007] IELTR; Bernardini, n 136 above; Cotula, n 136 above.
- ¹⁴¹ See Wälde and Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 *Tex Intl LJ* 215.
- ¹⁴² Maniruzzaman, in turn, divides economic equilibrium clauses into three categories: stipulated economic balancing provisions, non-specified economic balancing provisions, and negotiated economic balancing provisions (see [127 et seq. at n 136 above](#)).
- ¹⁴³ For further discussion of economic equilibrium clauses, see Professor Berger, 'Renegotiation and adaptation of international investment contracts: the role of contract drafters and arbitrators' (2003) VJTL 1348, and Al Qurashi, 'Renegotiation of International Petroleum Agreements' (2005) 22 *J Intl Arb* 261.
- ¹⁴⁴ Art 3(3) of the Rome Convention on the Law Applicable to Contractual Obligations of 1980.
- ¹⁴⁵ [Ch 2, paras 2.120 et seq.](#)
- ¹⁴⁶ Ybk Comm Arb, AJ van den Berg (ed), Vol XI (1986), 555–565.
- ¹⁴⁷ For a discussion of this subject, see Partasides and Burger, 'The Swiss Federal Tribunal's Decision of 8 March 2006: A Deepening of the Arbitrator's Public Policy Dilemma?' (2006) *Concurrences* No 3.
- ¹⁴⁸ [See n 126 above](#).
- ¹⁴⁹ Advocate General's Opinion, at para 21.
- ¹⁵⁰ In this regard, see also the Paris Cour d'Appel's decision in [Thalès Air Defence v GIE Euromissile et al. 18 November 2004, Case No 2002/60932](#). But for a contrary view that EC competition

law does not amount to a matter of public policy, see the Swiss Federal Tribunal's decision of 8 March 2006 at *ASA Bulletin*, Vol 24 No 2 (2006), 366 referred to at n 147 above.

¹⁵¹ Higgins, *Problems Process: International Law and How We Use It* (Clarendon Press, 1994), 39.

¹⁵² *Ibid.*, 50.

¹⁵³ See [Ch 8](#) in relation to the applicable law in disputes under investment treaties.

¹⁵⁴ Cf the observation of the court in a case brought many years ago: 'Thus, it may be, though perhaps it would be unusual, that the parties could validly agree that a part, or the whole, of their legal relations should be decided by the arbitral tribunal on the basis of a foreign system of law, or perhaps on the basis of principles of international law; eg, in a contract to which a Sovereign State was a party.' See *Orion Compania Espanola de Seguros v Belfort Maatschappij Voor Algemene Verzekering* [1962] 2 Lloyd's Rep 257, at 264.

¹⁵⁵ Higgins, n 151 above, 54.

¹⁵⁶ Art 38 of the Statute of the ICJ (which was established in 1945 and is generally known as 'the World Court') states that in applying international law to the disputes before it, the court is to apply, *inter alia*, those general principles of law.

¹⁵⁷ Jennings and Watts (eds), *Oppenheim's International Law* (Vol I, 9th edn, Oxford University Press 1992), at 29, and cited with approval by Professor Brownlie in his *Principles of Public International Law* (Oxford University Press, 2008), at 16. Professor Brownlie goes on to add that, in practice, tribunals exercise considerable discretion in how they choose, edit, and adapt elements of municipal jurisprudence (*ibid.* at 17).

¹⁵⁸ For an excellent (and, it must be admitted, detailed) work on this topic see Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1987).

¹⁵⁹ See the discussion of this [Convention](#) in [Ch 1](#).

¹⁶⁰ So long as the State has adopted the [Washington Convention](#).

¹⁶¹ Rawding (n 137 above) describes this option as subjecting national law to 'international quality control'. The issue of applicable law in cases brought under investment treaties is addressed in [Ch 8](#). For examples of ICSID cases resolved on the basis of international law (to the extent that there were gaps in the applicable host State law, or where its application would have produced a result inconsistent with international law) see: *Klöckner Industrie-Anlagen v Republic of Cameroon*, ICSID Case No. ARB/81/2, 03 May 1995; *Amco Asia Corporation v the Republic of Indonesia*, ICSID 16 May 1986; *Wena Hotels Limited v Arab Republic of Egypt*, Decision on annulment application, ICSID Case No. ARB/98/4; ILC 274 (2002); (2002) 41 ILM 933; (2004) 6 ICSID Rep 129; (2003) 130 Journal du Droit International Clunet 167, signed 28 January 2002; *Sempra Energy International v Republic of Argentina*, Award, ICSID Case No ARB/02/16; ILC 304 (2007), signed 18 September 2007, despatched 28 September 2007.

¹⁶² For a discussion of compensation, see [Ch 8, paras 8.79–8.97](#).

¹⁶³ [The Texaco arbitration, the BP arbitration, and the Liamco arbitration \(1981\) VI Ybk Comm Arb 89](#). See also Greenwood, 'State Contracts in International Law—The Libyan Oil Arbitrations' (1982) 17 ILM 14; Rigaux, n 133 above; and Stern, n 132 above.

¹⁶⁴ For this text, see the [Texaco arbitration, *ibid.*](#)

¹⁶⁵ 'The governing system of law is what that clause expressly provides, viz in the absence of principles common to the law of Libya and international law, the general principles of law, including such of those principles as may have been applied by international tribunals', [Judge Lagergren in the BP arbitration \(n 163 above\)](#).

¹⁶⁶ [Liamco v Libya \(1982\) 62 ILR 140, at 143](#). The fact that three different arbitrators could arrive at three different conclusions on the meaning of the same choice of law clause highlights one of the weaknesses of the arbitral system, which is the possibility of conflicting awards on the same basic problem: see Stern, n 132 above.

¹⁶⁷ *Aminoil*, n 135 above, at 980.

¹⁶⁸ [Ibid.](#), at 1000.

¹⁶⁹ [Ibid.](#), at 1001.

¹⁷⁰ See [para 3.141 et seq.](#)

¹⁷¹ The *trunc commun* doctrine was first elaborated by Rubino-Sammartano in 1987: see his article '[Le Tronc Commun des lois nationales en présence. Réflexions sur le droit applicable par l'arbitre international](#)' (1987) *Revue de l'Arbitrage* 133; and, by the same author, in *International Arbitration Law* (Kluwer Law International, 1990), 274.

¹⁷² The *Sapphire* arbitration, n 130 above.

¹⁷³ It is surprising in that the *trunc commun* is generally chosen as the 'politically correct' choice of law in cases involving a foreign State, not cases involving only private parties.

¹⁷⁴ When Eurotunnel sought an injunction to prevent Trans-Manche from carrying out a threat to cease work on part of the project.

¹⁷⁵ [Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd \[1992\] 1 QB 656](#), at 675.

¹⁷⁶ [Rubino-Sammartano](#), in 'The Channel Tunnel and the Tronc Commun Doctrine' (1993) 10 J Intl Arb 59 at 61, states: 'The Channel Tunnel contract is an example of an express choice by the parties and as such it does not seem to leave the door open to possible argument. The view expressed by Staughton LJ, "I suspect it will lead to lengthy and expensive dispute" cannot consequently be shared.' In fact, as stated in the text above, it was entirely accurate, in that two teams of lawyers, French and English, had to be engaged by each of the parties in order to advise on the many disputes that arose. It is true that the choice of law clause was clear. This is not the issue. What was not clear was what were the 'common principles' of French and English law which were applicable to the various different disputes which arose—including, eg, disputes as to whether a particular claim was or was not barred (or extinguished) by lapse of time.

¹⁷⁷ Duval, 'English and French Law: The Search for Common Principles' (1997) 25 Intl Business Lawyer 181, at 182.

¹⁷⁸ [Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd \[1993\] AC 334](#), at 368. In the same judgment, Lord Mustill said (at 353): '... having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go.'

¹⁷⁹ For further comment on the House of Lords decision see Reymond, 'The Channel Tunnel Case and the Law of International Arbitration' (1993) 109 LQR 337; and Veeder, 'L'Arret Channel Tunnel de la Chambre des Lords' (1993) 4 Revue de l'Arbitrage 705.

¹⁸⁰ [Rubino-Sommartano](#), n 176 above, 61: 'the common part of these two national laws must be treated as that chosen by the parties.'

¹⁸¹ [Washington Convention, Art 42](#).

¹⁸² The same division into specialist groups may be seen within law firms where, increasingly, clients are seeking specialist business sector advice or expertise.

¹⁸³ Columbus, *International Law of the Sea* (1967).

¹⁸⁴ *Ibid*.

¹⁸⁵ Bowden, 'Transnational Rules in International Commercial Arbitration' (1993) ICC Publication No 480/4, 127.

¹⁸⁶ See Professor Goldman, '*Lex Mercatoria*', Forum Internationale, No 3 (Nov 1983). The late Professor Goldman, having referred to the codification of international commercial practices, such as the ICC 'Uniform Customs and Practices for Documentary Credits' and the INCOTERMS, as evidence of the emergence of an *international* business practice (on which, see below para 3.189), stated, at p 5: 'Commentators in the early 1960s began to take note of this evolution. Clive Schmitthoff was the first in England to salute the new Law Merchant; in France, Philippe Kahn, with respect to international sales, Philippe Fouchard, with respect to international commercial arbitration and Jean Stoufflet, with respect to documentary credits, undertook to study this law. As for myself, I concluded that a place could be acknowledged for the *lex mercatoria*—a name which stuck—within the boundaries of the law.'

¹⁸⁷ Goldman, *ibid*, 3.

¹⁸⁸ *Ibid*.

¹⁸⁹ Goldman, '*La Lex Mercatoria* dans les contrats d'arbitrage internationaux: Réalité et Perspectives' (1979) Clunet J du Droit Intl 475; [Lalive](#), '*Transnational (or Truly International) Public Policy and International Arbitration*', ICC Congress Series No 3 (New York, 1986), 257; Gaillard, 'Transnational Rules in International Arbitration 1993' ICC Publication No 480/4 (a very helpful review of aspects of transnational law by distinguished contributors).

¹⁹⁰ See, for instance, [Mustill LJ](#), '*The New Lex Mercatoria: the First Twenty-five Years*' (1987) 4 Arb Intl 86, where he notes that: 'The *Lex Mercatoria* has sufficient intellectual credentials to merit serious study, and yet is not so generally accepted as to escape the sceptical eye.'

¹⁹¹ See, eg, Delaume, 'The Proper Law of State Contracts and the *Lex Mercatoria*: A Reappraisal' (1988) 3 ICSID Review—Foreign Investments Law Journal 79, where (at 106) this experienced international practitioner suggests that the risk of changes in State law to the detriment of the private party to a State contract may be insured under the Convention Establishing the Multilateral Investment Guarantee Agency ((1985) 24 ILM 1589) and that this is far more adapted to the commercial realities 'than the *Lex Mercatoria* which remains, both in scope and in practical significance, an elusive system and a mythical view of a transnational law of State Contracts whose sources are elsewhere.'

¹⁹² See, for instance, Mann, 'The Proper Law in the Conflict of Laws' (1987) 36 ICLQ 437, at 448; and Toope, n 49 above,

particularly at p 96 where the author concludes: '[i]t would appear that the so-called *lex mercatoria* is largely an effort to legitimise as 'law' the economic interests of Western corporations.'

¹⁹³ Goldman, n 189 above, 6.

¹⁹⁴ Although Professor Goldman himself contended that it was part of a legal order.

¹⁹⁵ Goldman, n 189 above, 21.

¹⁹⁶ Both the [ICC Rules \(Art 17.2\)](#) and the [UNCITRAL Rules \(Art 33.3\)](#) require arbitrators to take account of relevant trade usages.

¹⁹⁷ See, eg, Berger, *The Creeping Codification of Lex Mercatoria* (1999), 212; Mustill, n 190 above—although he thought the results 'a modest haul for twenty-five years of international arbitration'; Paulsson, 'La *lex Mercatoria* dans l'arbitrage de la CCI' (1990) *Revue de l'Arbitrage* 55; and Dalhuisen, 'Legal orders and their manifestation; the operation of the international commercial and financial legal order and its *lex mercatoria*' (2006) *Berkeley J Intl L* 129, at 179 *et seq*.

¹⁹⁸ Prepared by the Lando Commission and sometimes called the 'Lando Principles'.

¹⁹⁹ Berger, n 197 above.

²⁰⁰ See Berger, 'Lex Mercatoria Online. The Central Transnational Law Database at www.tldb.de' (2002) 18 *Arb Intl* 83.

²⁰¹ Fortier, 'The new, new *lex mercatoria*, or back to the future' (2001) 17 *Arb Intl* 126.

²⁰² Gaillard, 'Transnational law: a legal system or a method of decision-making' (2001) 17 *Arb Intl* 62.

²⁰³ Gaillard, *ibid*, 60; and see also Fortier, n 201 above.

²⁰⁴ Gaillard, n 202 above, 64.

²⁰⁵ Molineaux, 'Applicable law in arbitration—The coming convergence of civil and Anglo-Saxon law via Unidroit and *lex mercatoria*' (2000) 1 *Journal of World Investment* 130.

²⁰⁶ Fortier, n 201 above, 124–125.

²⁰⁷ Mayer, 'The UNIDROIT Principles in Contemporary Contract Practice' in ICC Bulletin—Special Supplement: UNIDROIT Principles of international commercial contracts—Reflections on their use in international arbitration (2002), 111.

²⁰⁸ Except on procedural matters, which are not under consideration here.

²⁰⁹ For instance, in authorising arbitrators to choose the governing law of the contract, where the parties have not done so, without necessarily following the conflict rules of the place of arbitration.

²¹⁰ Cf the statement of Lord Mustill in the *Channel Tunnel* case (n 178 above): 'having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go.'

²¹¹ At its conference in Cairo, April 1992.

²¹² 'Transnational Rules in International Commercial Arbitration' ICC Publication No 480/4 (and at nn 185 and 189 above). Note, however, that if no choice of law has been made by the parties, the arbitral tribunal may not be free to choose anything other than national law: see below.

²¹³ *Banque du Proche-Orient v Société Fougerolle*, Cass. Civ. 2e, 9 December 1981 (2nd decision) and Cass. Civ. 1ère, 22 October 1991. [Judgment of the Austrian Supreme Court](#), 18 November 1982, reproduced in (1984) IX Ybk Comm Arb 161. [Deutsche Schachtbau und Tiefbohrgesellschaft GmbH \(F/Germ\) v Ras Al Khaimah National Oil Co \(Ras Al Khaimah, UAE\) Shell International Petroleum Co Ltd \(UK\)](#) [1987] 3 WLR 1023 (reversed on other grounds: [1990] 1 AC 295). See also Rivkin, 'Enforceability of awards based on *lex mercatoria*' (1993) 19 *Arb Intl* 47.

²¹⁴ ICC Publication No 400.

²¹⁵ ICC Publication No 350. Both INCOTERMS and documentary credits are discussed with trade usages at [para 3.189, below](#).

²¹⁶ See [paras 3.174, 3.177, and 3.179](#).

²¹⁷ The UNIDROIT Principles were revised in April 2004. They may be accessed on the [UNIDROIT website at <http://www.unidroit.org>](http://www.unidroit.org).

²¹⁸ Art 1.7 states: 'Each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty.'

²¹⁹ See van Houtte, 'The UNIDROIT Principles of International Commercial Contracts' (1995) 11 *Arb Intl* 374.

²²⁰ A commentary on the revised principles has been published by UNIDROIT entitled: 'UNIDROIT Principles of International Commercial Contracts, 2004'.

²²¹ More precisely, the opening words to the preamble to the UNIDROIT Principles state: '[t]hese Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by "general principles of law", the "*lex*

mercatoria” or the like.’

222 See Stockholm Arbitration Report 2002 at 59, with commentary by Fernandez-Armesto.

223 In the same manner as an exemption clause might be disregarded under domestic legislation to protect consumers.

224 Art 7.1.6.

225 [ICC Rules, Art 17.2](#); [UNCITRAL Rules, Art 33.3](#).

226 [Art 28\(4\)](#).

227 [Art 1054](#).

228 ICC Publication No 350.

229 ICC Publication No 400.

230 These range from Arab countries such as Saudi Arabia, the UAE, Kuwait, Oman, Bahrain, Syria, Yemen, Iraq, and Iran, to African States such as Egypt, Tunisia, Sudan, Morocco, and Algeria, and to Asian States such as Pakistan, Bangladesh, Malaysia, and Indonesia.

231 Namely, for Sunni schools of law, the *Sunnah* (the sayings and practices of the Prophet Muhammad), *Ijma* (consensus among recognised religious authorities), and *Qiyas* (inference by precedent). For a general introduction to the structure and evolution of Islamic law, see Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964).

232 The constitutions of Yemen, Qatar, and Egypt, for example, state that the *Shari'ah* is a primary source of law.

233 See [Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah' \(2004\) 20 Arb Intl 97](#).

234 See [Darwazeh, 'Arbitration in the Arab World: An Interview with Professor Ahmed Sadek El-Kosheri' \(2008\) 25 J Int Arb No 2, 203–210](#).

235 *Sanghi Polyesters Ltd (India) v The International Investor KCFC (Kuwait)* [2000] 1 Lloyd's Rep 480.

236 See also [Musawi, discussed below at para 2.84](#).

237 Professor Fadlallah, 'Arbitration Facing Conflicts of Culture—The 2008 Freshfields Lecture'. At the time of writing the lecture was not yet published but was anticipated to be published in Volume 25 Number 3 of *Arb Intl* (2009).

238 *Beximco Pharmaceuticals Ltd and others v Shamil Bank of Bahrain EC* [2004] EWCA Civ 19, discussed by Fadlallah, n 237 above. Also of interest is a recent question posed in the English Parliament on 15 December 2008 of which 'Islamic tribunals' have authority to act under the English Arbitration Act 1996. The Minister of State, Department for Business, Enterprise and Regulatory Reform responded that there is 'no specific provision in the Arbitration Act 1996 for 'Islamic Tribunals' but that '[t]he Act allows all parties to have their disputes decided by a set of principles of their choice rather than by national law'. He also referred to the Muslim Arbitration Tribunals (MAT), established in 2007 to provide an alternative route to resolve civil issues in accordance with *Shari'ah* principles. The MAT operates according to the principles of the Arbitration Act 1996 (HC Deb, 15 December 2008 C465-466W).

239 [Fadlallah, n 237 above](#).

240 (1952) ICLQ 247.

241 (1956) 20 Int L Rep 534.

242 (1963) 27 Int L Rep 117.

243 [Sheikh Abu Dhabi \(n 240 above\)](#).

244 [Fadlallah, n 237 above](#).

245 [Art 42 \(emphasis added\)](#).

246 [Art 1496 of the Code of Civil Procedure, Decree No 81–500 of May 12, 1981](#); [Swiss Private International Law Act 1987, Ch 12, Art 187](#). The ICC Rules also now refer to 'the rules of law' (in Art 17) rather than to 'the law' to be applied.

247 [Model Law, Art 28 \(emphasis added\)](#). Despite the early approach of the common law to require tribunals to apply a fixed and recognisable system of law, the adoption of the Model Law in various common law countries including Australia, Canada, Hong Kong, and New Zealand) means there is now growing express recognition of the concept.

248 [English Arbitration Act 1996, s 46](#).

249 [2007] EWHC 2981.

250 [2007] EWCA Civ 291.

251 As noted above, however, an arbitration agreement must be governed by the law of a country (in this case Swiss or English Law—the decision was never made) and could not be governed by Jewish law.

252 [ICC Rules, Art 17\(1\)](#).

253 eg they may choose general principles of law, or the *lex mercatoria*, or the [UNIDROIT Principles](#).

254 See Loquin, *L'amiable compositeur en droit comparé et international. Contribution à l'étude du non-droit dans l'arbitrage international* (1980).

- ²⁵⁵ Paris, 11 January 1996, 351; see also Professeur Loquin (1996) Rev Arb 100.
- ²⁵⁶ See, eg, Ecuador's Law of Arbitration (145/1997), which states at Art 3: 'The parties will decide whether the arbitrator shall decide in law or in equity. Unless otherwise agreed, the award shall be in equity.' Other countries reverse this presumption—see Chile's Judicial Code, Art 235: 'If the parties have not indicated the type of arbitrator, the law presumes that he will be an arbitrator at law.'
- ²⁵⁷ See Mayer, 'Reflections on the International Arbitrator's Duty to Apply the Law—The 2000 Freshfields Lecture' (2001) 17 Arb Int 235, 237–240 for a discussion of how arbitrators may not be bound to apply the law.
- ²⁵⁸ The Report issued after the ILA's 73rd Conference, held in Rio in August 2008, is available on the ILA's website: <http://www.ila-hq.org/en/committees/index.cfm/cid/19>. The Annex Resolution No 6/2008 contains guidance split into the following sections: general considerations; acquiring information relevant to the ascertainment of the applicable law; interaction with the parties; making use of information about the law's content; and guidance in special circumstances, eg where public policy is implicated. Recommendations of particular note are: Recommendation 4, that the rules governing the ascertainment of the contents of law by national courts are not necessarily suitable for arbitration and that arbitrators should not rely on unexpressed presumptions as to the contents of the applicable law, including any presumption that it is the same as the law best known to the tribunal or to any of its members, or even that is the same as the law of the seat of arbitration; Recommendation 5, that arbitrators should primarily receive information about the contents of the applicable law from the parties; and Recommendation 6, that arbitrators should not introduce legal issues (propositions of law that may bear on the outcome of the dispute) that the parties have not raised.
- ²⁵⁹ See n 117 above.
- ²⁶⁰ Rome Convention, Art 3(1) (emphasis added).
- ²⁶¹ [1980] Official Journal of the European Union No C282, 1.
- ²⁶² Ibid, p 17; and see Dicey, Morris & Collins, *The Conflict of Laws* (14th edn, Sweet & Maxwell, 2000), 1541 *et seq* (emphasis added).
- ²⁶³ Rome Convention, Art 4; and see Dicey, Morris & Collins, *ibid*, 1582 *et seq* for a commentary on this provision of the Convention, which is based on Swiss and, subsequently, Dutch law.
- ²⁶⁴ See Stockholm Arbitration Report 2002, p 59, with commentary by Fernandez-Armesto.
- ²⁶⁵ See, for instance, the English case of *Egon Oldendorff v Liberia Corporation* [1995] 2 Lloyd's Rep 64; (No 2) [1996] 2 Lloyd's Rep 380. The fact that the contract was in the English language may also have played some part in the court's decision. The law governing an arbitration clause has been discussed above.
- ²⁶⁶ *Sonatrach Petroleum v Ferrell International* [2002] 1 All ER 637.
- ²⁶⁷ See [para 3.95](#) and [para 3.207](#), above.
- ²⁶⁸ It is worth noting that arbitral agreements are expressly excluded from the scope of the Convention by Art 1(2)(d); but the discussion in the present section is about contracts as a whole and not about a separate (or separable) agreement to arbitrate.
- ²⁶⁹ Rome Convention, Art 4(2).
- ²⁷⁰ Goldman, 'La *lex mercatoria* dans les contrats et l'arbitrage internationaux: réalité et perspectives' [1979] J du Droit Intl 475 at 491.
- ²⁷¹ The *Sapphire* arbitration, n 130 above.
- ²⁷² [Washington Convention, Art 42\(1\)](#).
- ²⁷³ [European Convention of 1961, Art VII](#).
- ²⁷⁴ [UNCITRAL Rules, Art 33](#).
- ²⁷⁵ [Model Law, Art 28\(2\)](#).
- ²⁷⁶ [Art 1496 of the Code of Civil Procedure, Decree No 81–500 of 12 May 1981](#).
- ²⁷⁷ The ICC Rules, Art 17(1) and the LCIA Rules, Art 22(3); SCC Rules, Art 24(1) and WIPO Arbitration Rules, Art 59(1) also endorse the direct approach.
- ²⁷⁸ Canada—[Ontario International Commercial Arbitration Act 1990, Art 6](#); [Indian Arbitration Act 1996, Art 28\(1\)\(b\)\(iii\)](#); Kenyan Arbitration Act 1995, Art 29(3); and [Netherlands Arbitration Act 1986, Art 1054](#). [Swiss law also comes close to the same position, in Art 187 of the Swiss Private International Law Act 1987](#).
- ²⁷⁹ Park, n 3 above.
- ²⁸⁰ [IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999](#).
- ²⁸¹ [IBA Guidelines on Conflicts of Interest in International Arbitration of May 2004](#).
- ²⁸² See the ILA report referred to above at [para 3.205](#) and n 259.
- ²⁸³ Park, n 3 above.
- ²⁸⁴ Phillips, 'Is Creeping Legalism Infecting Arbitration' (2003) 58

Disp Res J 37.

²⁸⁵ Bar Council of England and Wales, code of conduct, Part II, section 705(a), and see, eg, *R v Mordou and others*: '[t]here is no place for witness training in this country, we do not do it. It is unlawful' ([2005] EWCA Crim 177).

²⁸⁶ [van Houtte, 'Counsel-Witness Relations and Professional Misconduct in Civil Law Systems' Arb Intl, Vol 19, No 4 \(2003\), 457–63](#). Professor van Houtte argues that Art 4 (Applicable Rules of Conduct in Court) of the Code of Conduct for European Lawyers has the effect that whenever the seat of the arbitration is within the EU, the ethical standards of the seat apply. For standards that should apply to participants in the arbitral process, see [Veeder, 'The 2001 Goff Lecture—The Lawyer's Duty to Arbitrate in Good Faith' \(2002\) Arb Intl 431](#).

²⁸⁷ Paulsson, 'Standards of Conduct for Counsel in International Arbitration' (1992) 3 Am Rev Intl Arb 214. In a similar vein, the Code of Conduct for European Lawyers, referred to in n 286 above, was originally drawn up and adopted in 1998 by the Conseil des Barreaux de la Communauté Européene (CCBE).

²⁸⁸ The Brussels Bar Rules contain such express exceptions. For a further discussion of the issue, see van Houtte, n 290 above.

²⁸⁹ n 3 above.

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**CONTEMPORARY PROBLEMS
OF INTERNATIONAL LAW:**

**Essays in honour of Georg Schwarzenberger
on his eightieth birthday**

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INTERNATIONAL ARBITRATION BETWEEN INDIVIDUALS AND GOVERNMENTS AND THE CONFLICT OF LAWS

K. LIPSTEIN

I. THE FRAMEWORK

Some forty years ago an examination of the practice of international tribunals, mainly arbitral, in proceedings between States during the period from 1800 until 1939 disclosed the existence of an independent system of rules of the conflict of laws adapted to the needs of the tribunals which administered them.¹ The reason is that international tribunals have no *lex fori* except international law.² However, claims for State responsibility in respect of damage to proprietary interests in the broadest sense (contractual or in the form of title to property) of nationals of a claimant State call, first of all, for a determination whether such a right exists and is vested in the alien. This is preliminary or incidental to the principal question, which is whether in the light of public international law, a right of a proprietary nature has been infringed so as to constitute an international wrong.

A series of notable awards of a slightly different character during the last thirty years invites a review of the conclusions reached a long time ago. These awards were made in arbitration proceedings between a State and nationals of another arising out of concession agreements, and not in proceedings between States themselves. They therefore have a mixed character of a kind which differs from inter-State proceedings involving claims based on State responsibility where questions of private law arise incidentally only, as well as from those arbitral proceedings between States in which claims of a private law nature between nationals of the respective States are dealt with

¹ K. Lipstein, "Conflict of Laws before International Tribunals, Part II," 29 *Transaction of the Grotius Society* (1944), p. 51; K. Lipstein, "The General Principles of Private International Law," in Hague Academy, 135 *Recueil des Cours* (1972-I), p. 99, at p. 173 *et seq.*; C. Greenwood, "State Contracts in International Law—The Libyan Oil Arbitrations", 53 *B.Y.I.L.* (1982), p. 27; A. Redfern, "The Arbitration Between the Government of Kuwait and Amينوil," 55 *ibid.* (1984), p. 65; J. Baloro, "The Legal Status of Concession Agreements in International Law", 19 *Comparative and International Law Journal of South Africa* (1986), p. 410; and see the literature cited by C. Croff, "The Applicable Law in an International Commercial Arbitration: Is it Still a Conflict of Laws Problem?", 16 *International Lawyer* (1982), p. 613, at p. 614, note 1.

² See now *Saudi Arabia v. Arabian American Oil Co.* (1959) 27 *International Law Reports* (hereinafter referred to as *Int.L.R.*) 117, 156 (hereinafter referred to as *Aramco*); *B.P. v. Libyan Arab Republic* (1974) 53 *Int.L.R.* 297, 326 (hereinafter referred to as *B.P.*); A. A. Fatouros, "International Law and the Internationalized Contract," 74 *A.J.I.L.* (1980), p. 134, at p. 137; Croff, *loc. cit.* in note 1 above, at p. 624.

en bloc (for example, by the Mixed Arbitral Tribunals set up after the First World War and the United States-Iranian Tribunals under the Agreement of January 19, 1981). The awards to be examined here have an international character inasmuch as one of the parties to the original relationship is a State and the other a national of another, that the subject matter is not confined to the boundaries of one country only and that therefore the arbitration proceedings are intended to be international rather than national.

On the other hand, the concession agreements, which are directly in issue and not only incidentally, have close links with municipal law and envisage rights under a specific system of municipal law. Moreover, however international the composition and the remit of the tribunal, its seat is local within the jurisdiction of some State and subject to it, leaving aside questions of State immunity (to be discussed below). Owing to this discordant note, agreements of this kind are said to have become "delocalised"³ or "internationalised,"⁴ and to be no longer subject to one system of laws.⁵ In the words of Dupuy, arbitrator in the *Texaco* case:

"Contractual practice tends more and more to "delocalise" the contract or . . . to sever its automatic connections to some municipal law, and particularly the municipal laws of a contracting State, so much so that today when the municipal law of the contending State governs the contract, it is by virtue of the agreement between the parties and no longer by a privileged and, so to say, mechanical application of the municipal law."

The notion of delocalisation or internationalisation has been employed to convey, on the one hand, that an arbitral tribunal, in reaching its decision, may rely on international law either exclusively or in conjunction with municipal law and, on the other hand, that a combination of municipal systems of law may take the place of a single system of laws. It has also been interpreted in the sense that in order to ascertain the municipal system of

³ *Texaco v. Libyan Arab Republic* (1977) 53 Int.L.R. 393, 443 (hereinafter referred to as *Texaco*); *Revere Copper & Brass Inc. v. Overseas Private Investment Corp.* (1978) 56 Int.L.R. 258, 274-275, 278 (hereinafter referred to as *Revere*); J. Paulsson, "Arbitration Unbound: Award Detached From the Law of its Country of Origin", 30 I.C.L.Q. (1981), p. 358, at p. 362; F. Rigaux, "Des dieux et des héros," 67 *Revue critique de droit international privé* (1978), p. 435.

⁴ *Texaco* 458; *Government of Kuwait v. American Independent Oil Co.* (1984) 66 Int.L.R. 518, 560 (hereinafter referred to as *Aminoil*); *S.P.P. (Middle East) Ltd. et al. v. Arab Republic of Egypt*, 22 I.L.M. (1983), p. 752, at p. 769 (para. 49) (hereinafter referred to as *EGOTH*); for some comments, positive and negative, see F. A. Mann, *Studies in International Law* (1973), pp. 222 *et seq.*, and 262 *et seq.*; F. Rigaux, *Droit public et droit privé dans les relations internationales* (1977), p. 376 *et seq.*, especially at p. 400; J. D. M. Lew, *Applicable Law in International Commercial Arbitrations* (1978), s.100, p. 82; J. Fouchard, *L'arbitrage commercial international* (1965), ss.35, 362, 465; Fatouros, *loc. cit.* in note 2 above at pp. 135-137; F. Rigaux, *loc. cit.* in note 3 above, at p. 446; Redfern, *loc. cit.* in note 1 above, at pp. 77-87.

⁵ *B.P. 327*; *Texaco* 455; *Revere* 466-667; *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.* (1963) 35 Int.L.R. 136, 172 (hereinafter referred to as *Sapphire*).

laws which must determine the contractual rights and obligations of the parties, the tribunal must rely, as a framework⁶ or basis, on principles of choice of law which are to be found by the tribunal either in its own notions of law⁷ or in public international law,⁸ which may perhaps rely on the general principles of private international law.⁹

Alternatively, without a firm framework or legal foundation, a combination of legal systems, including substantive international law¹⁰ is to determine the substance of a dispute. No specific principles, rules or criteria for selecting the laws to form this combination have been established, however; instead the will of the parties as expressed in their agreement has furnished the ultimate justification.¹¹ The oil concessions granted by Libya and by other Arab States provided a standard clause (clause 28) to this effect.

“The Concession is governed and interpreted in accordance with the principles of law of Libya [Kuwait] common to the principles of International Law and in the absence of such common principles by and in accordance with the general principles of law including such of these principles as may have been applied by international tribunals.”

Free choice of law as a rule of international conflict of laws, part of public international law, has, of course, long been admitted by international tribunals set up between States,¹² and by international instruments.¹³ On its own in arbitration proceedings between a State and an alien, not derived

⁶ The term “selector clause,” employed by D. Suratgar, “The Sapphire Arbitration Award,” 3 *Columbia Journal of Transnational Law* (1965), p. 152, at pp. 176, 185, may perhaps convey the same meaning.

⁷ *Aramco* 166; *Aminoil* 560; distinguish the *Diverted Cargoes* case, *Greece v. United Kingdom* (1955) Int.L.R. 820, 824; 46 *Revue critique de droit international privé* (1957), p. 278, at p. 289; a contract between States was in issue; see J. L. Simpson, “The Diverted Cargoes Arbitration,” 5 *I.C.L.Q.* (1956), p. 471, at p. 482; J. Dach, “Money Reference and Conversion of Foreign Money” 5 *American Journal of Comparative Law* (1956), p. 512, at p. 515; J. L. Simpson and H. Fox, *International Arbitration* (1959), p. 135; P.-Y. Tschanz, “The Contribution of the Aminoil Award to the Law of State Contracts,” 18 *International Lawyer* (1984) p. 245, at p. 260.

⁸ *Texaco* 450; *Libyan Oil v. Government of the Libyan Republic* (1977) 62 Int.L.R. 140, 172 *et seq.* (hereinafter referred to as *Liamco*); *Revere* 272, applying the *Serbian and Brazilian Loans* cases, P.C.I.J., Series A, Nos. 20 and 21 “much refined”; also *Aramco* 165; F. R. Tesón, “State Contracts and Oil Expropriations: The Aminoil Arbitration,” 24 *Virginia Journal of International Law* (1984), p. 323, at p. 328, but see Tschanz, *loc. cit.* in note 7 above, at p. 263.

⁹ *Aramco* 157.

¹⁰ *Sapphire* 173 (interpretation); *Revere* 294; Croff, *loc. cit.* in note 1 above, at p. 615.

¹¹ *Sapphire* 174; *B.P.* 302; *Texaco* 404; *Liamco* 172; *Aminoil* 560 (6).

¹² Lipstein, *loc. cit.* in note 1 above; H. Batiffol, “L’arbitrage et les conflits de loi,” *Revue de l’arbitrage* (1957), p. 111; Ch. Carabiber, *L’arbitrage international de droit privé* (1960), pp. 50, 92; Croff, *loc. cit.* in note 1 above, at p. 616.

¹³ European Convention on International Commercial Arbitration of April 21, 1961, Art. VII(1), 484 U.N.T.S. 364; Convention on the Settlement of Investment Disputes between States and Nationals of other States of March 18, 1965 (hereinafter referred to as ICSID Convention), 575 U.N.T.S. 159, Art. 42(1).

**INTERNATIONAL
COMMERCIAL
ARBITRATION**
A TRANSNATIONAL PERSPECTIVE

Fifth Edition

■ ■ ■

By

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COMMENTARY

At least as a matter of theory, the problem of selecting the rules applicable to the substance of the dispute is more complicated in international commercial arbitration than it is for a domestic court or for an arbitral tribunal in a purely domestic arbitration. In courts and in domestic arbitration, there is generally a single set of choice of law rules that govern the choice. For a court, this set will be the binding choice of law rules promulgated by the legislature of the State in which the court sits. In a domestic arbitration, the situation is often similar: the arbitral tribunal will either, like a domestic judge, employ the domestic conflicts rules of the place of arbitration, or it will almost automatically apply the substantive law of the State in which the parties reside, the contract was to be performed, and the arbitration takes place.¹ There will in any event not usually be a choice of several potentially applicable rules to govern the selection of the applicable law.

In international commercial arbitration, on the other hand, the tribunal is not bound to apply the conflicts rules of the place of arbitration, and no single body of substantive law or rules will necessarily be the obvious and unquestioned choice. The element that makes the arbitration international—be it the place of arbitration, the place of performance, or the state of residence of one party—will generally introduce a potentially different rule of private international law.

National arbitral laws rarely address the question of choice of law.² They are generally designed primarily for arbitrations connected solely with the enacting State, and in such noninternational arbitration there is rarely a serious choice of law question. In order fully to meet the needs of international arbitration, therefore, the Model Law, like international conventions on arbitration⁴ and some rules designed for international arbitration,⁵ provides guidelines on this subject. As the Commission report noted, there was wide support for the view “that the model law would be

1. The problem is a bit more complicated in federal systems, because each state, province, canton, or district may well have differing provisions of both substantive law and conflicts rules. Still, a federal rule for choosing among those provision will frequently apply.

2. See Y. Derains, *Possible Conflict of Laws Rules and the Rules Applicable to the Substance of the Dispute in UNCITRAL's Project for a Model Law on International Commercial Arbitration* 169, 174 (ICCA Congress Series No. 2. P. Sanders ed. 1984). This author notes only two recent laws that address the topic, and each of these provides a special regime designed for international arbitration. *Id.* These are the French Code of Civil Procedure of 1981, in its Article 1496 [Authors' note: for the current provision of the French Code of Civil Procedure, see Article 1511 (in force as of May 1, 2011)], and the Djiboutian Code on international arbitration adopted in 1984, in its Article 12.

The French provision states (in translation): “The arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to the rules he deems appropriate. In all cases he shall take into account trade usages.” *Id.* The Djiboutian provision is essentially to the same effect. *Id.*

4. *E.g.*, European Convention on International Commercial Arbitration. Art. VII, 484 U.N.T.S. 349 (Geneva 1961); Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Art. 42 575 U.N.T.S. 159 (Washington 1965).

5. *E.g.*, UNCITRAL Arbitration Rules. Art. 33 (1976); ICC Rules of Arbitration. Art. 13(3) (1988) [Art. 21(1) of the 2012 ICC Rules]; Rules of the London Court of International Arbitration. Art. 13.1(a) (1985).

incomplete without a provision on rules applicable to the substance of disputes, particularly in view of the fact that the model law dealt with international commercial arbitration where a lack of rules on that issue would give rise to uncertainty.”

The Model Law attempts to provide rules that are in line with generally accepted modern theory and practice. There was little disagreement on the main points of policy: first, that the parties should have complete autonomy to choose any rules to govern the substance of the dispute, even if those rules are territorially unconnected with the contract or the dispute; second, that in the absence of a choice by the parties the choice should be made by the arbitral tribunal; third, that the Model Law should recognize an agreement by the parties to have the arbitral tribunal decide the dispute *ex aequo et bono* or as *amiable compositeur*.

Nevertheless, there was a divergence of opinion and lengthy discussion as to some of the details of these policies, in particular, as to the precise scope of both the parties' power to agree on, and the arbitral tribunal's power to choose, the applicable rules governing the substance of the dispute.

Paragraph 1. Paragraph 1 permits the parties to make a binding choice of law to govern the dispute and provides a rule of construction for interpreting whether that choice includes the chosen law's conflict of law rules. The primary issue here was whether the parties could choose not only the body of law in force in a particular jurisdiction but also parts of other legal codes or part or all of sets of rules not in force as such anywhere. For example, the parties might wish their dispute to be decided in accordance with an international convention or uniform law that is not yet in force, or they may wish a decision based on parts of the law of various States. In favor of this latter approach, it was noted that allowing the parties to choose such rules was not essentially different from recognizing their freedom to choose a national law that was unconnected with the dispute—a freedom that was widely accepted.

The Working Group adopted this view. The First Draft specifically mentioned the possibility of the parties' choosing “even if not yet in force, a pertinent international convention or uniform law.” This specific approach was thought to raise problems, however.¹⁰ A broader and less explicit rule was suggested:

[I]t was . . . suggested that the statement as to the autonomy of the parties might be broadened in this article to enable the parties implicitly to designate parts of different systems of law as applicable to the substance of their dispute. It was suggested that the autonomy of the parties could be broadened implicitly by a rule according to

10. “It was felt that the designation of an international convention or uniform law which was not yet in force in any State would cause difficulties in determining the relationship between the text and the other national law applicable to the substance of the dispute.” Second Working Group Report, A/CN.9/232, para. 162, p. 779 *infra*. As noted below, though, the view of those who prevailed on these issues in the Commission appears to have been that the text finally adopted would permit choosing legal texts not yet in force.

 Positive

As of: October 12, 2015 10:24 AM EDT

[Tkachyov v. Levin](#)

United States District Court for the Northern District of Illinois, Eastern Division

September 24, 1999, Decided ; September 27, 1999, Docketed

CAUSE NO. 98C3120

Reporter

1999 U.S. Dist. LEXIS 15221; 1999 WL 782070

ALEXANDER TKACHYOV, et al., Plaintiffs, v. ANATOLY LEVIN, et al., Defendants.

Disposition: [*1] Defendant Levin's Motion to Dismiss Amended Complaint Based upon Forum Non Conveniens (doc. #25-1) GRANTED. Defendant Levin's Motion to Dismiss Amended Complaint under Rule 12 (doc. # 's 26-1, 26-2 & 26-3) DENIED in part and GRANTED in part. Plaintiff Fedulov dismissed from cause of action. Plaintiff Igor Lerner dismissed from Count I. Counts III and V of Plaintiffs' Amended Complaint dismissed.

Core Terms

shareholders, plaintiffs', forum non conveniens, residents, parties, unjust enrichment, Counts, breach of contract, alternative forum, allegations, cause of action, fiduciary duty, corporations, requirements, breached, profits, argues, courts

Case Summary

Procedural Posture

This was a fraud and Racketeer Influenced and Corrupt Organization Act, *18 U.S.C.S. § 1961 et seq.*, cause of action by plaintiffs, investors in a Latvian bank, against defendants, the bank's president and others. Defendants filed a motion to dismiss based upon forum non conveniens, and a motion to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(6).

Overview

This was a fraud and Racketeer Influenced and Corrupt Organization Act (RICO), *18 U.S.C.S. § 1961 et seq.*, cause of action by plaintiffs, investors in a Latvian bank, against defendants, the bank's president and others. Defendants filed a motion to dismiss based upon forum

non conveniens, and a motion to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(6). Dismissal of breach of contract claim was granted only as to the one plaintiff who was not a party to the contract, and denied under Fed. R. Civ. P. 8 because the complaint put defendants on notice of their claim for relief. The RICO claim was dismissed for failure to allege fraud with adequate specificity under Fed. R. Civ. P. 9 and because shareholders lack standing to assert a RICO claim, which only the corporation can assert. Dismissal of the remainder of the case was granted on forum non conveniens grounds. Latvia existed as an alternative forum. Many of the witnesses resided in Latvia. There was no local interest in the case, which involved New York investors in a Latvian bank. The court was unfamiliar with Latvian law. All parties were either subject to compulsory process in Latvia or consented to it.

Outcome

Dismissal was granted on forum non conveniens grounds. Suit involved New York investors in Latvian bank. Most of the discovery would have had to be conducted in Latvia, making Latvia the proper alternative forum. Dismissal was granted as to racketeering claim for failure to plead fraud with adequate specificity and because shareholders lack standing to assert a racketeering claim, which belongs only to the corporation as the injured party.

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1 Fed. R. Civ. P. 8(a)(2) requires a short and plain statement of the claim showing that the pleader is entitled to relief. In addition, Fed. R. Civ. P. 8(e)(1)

states that each averment of a pleading be simple, concise and direct. The primary purpose of these provisions is rooted in fair notice: Under Fed. R. Civ. P. 8, a complaint must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is. Thus, although the plaintiffs must show that they are entitled to relief, it is not necessary that they set out in detail the facts upon which their claim is based. Nevertheless, despite Fed. R. Civ. P. 8(a)'s allowance that the complaint's statement of the claim be short and plain, plaintiffs may not fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2 Fed. R. Civ. P. 8(e)(2) explicitly states that a party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or separate counts or defenses.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN3 Fed. R. Civ. P. 9(b) requires that fraud be plead with particularity.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN4 In causes of action under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C.S. § 1961 et seq., the plaintiff must state the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff. This is especially true in cases where there are multiple defendants. In those circumstances, the complaint should inform each defendant of the nature of his alleged participation in the fraud.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Direct Actions

Civil Procedure > ... > Justiciability > Standing > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN5 It is well settled that shareholders of a corporation do not have standing as individuals to bring an action under the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C.S. § 1961 et seq., for a loss in their stock's value which was the result of the alleged racketeering activities conducted against the corporation. Only the directly injured party, rather than individual shareholders, may bring claims under RICO.

Governments > Courts > Common Law

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

HN6 Under Illinois law, to plead a legally sufficient common law fraud claim, a plaintiff must allege that: (1) defendant made a statement; (2) of a material nature; (3) which was untrue; and (4) was known by defendant to be untrue, or was made in culpable ignorance of its truth or falsity; (5) was made for the purpose of inducing reliance by the plaintiff; (6) was actually relied on by the plaintiff; and (7) resulted in the plaintiff's injury.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Torts > Intentional Torts > Conversion > General Overview

Torts > Intentional Torts > Conversion > Elements

HN7 A proper complaint alleging conversion sets forth facts showing: (1) an unauthorized and wrongful assumption of control, dominion, or ownership by a defendant over a plaintiff's personalty; (2) plaintiff's right in the property; (3) plaintiff's right to the immediate possession of the property; and (4) a demand for possession of the property.

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > Breach of Fiduciary Duty

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Duty of Good Faith & Loyalty

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > General Overview

Governments > Fiduciaries

HN8 Under Illinois law, it has long been established that a single controlling shareholder owes fiduciary duties to other shareholders in the corporation. In small corporations, the duties of a majority shareholder to a minority shareholder are similar to those of a partner. Thus, shareholders are bound to exercise their rights and perform their duties with the highest degree of honesty and good faith.

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

HN9 Majority shareholders are prohibited from enhancing their personal interests at the expense of the corporation's interests.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > Direct Actions

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

Governments > Fiduciaries

HN10 Generally, a breach of a fiduciary duty claim belongs to the corporation, and not an individual shareholder. Fed. R. Civ. P. 23.1. However, in limited circumstances, individual shareholders may bring suit to enforce a corporate cause of action against officers, directors, and third parties. When an injury is suffered directly by an individual shareholder, or relates directly to an individual's stock ownership, the action is personal.

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Contracts Law > Remedies > Equitable Relief > General Overview

HN11 Plaintiffs may plead both breach of contract and unjust enrichment alternatively in a single complaint.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN12 Under the principle of forum non conveniens, a district court may dismiss a suit which it has jurisdiction over if, in the ends of justice, it best serves the convenience of the parties.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN13 A district court may dismiss a case when an alternative forum has jurisdiction, and when a trial in the plaintiffs' chosen forum would burden the defendant to a degree that cannot be outweighed by the plaintiffs' convenience.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN14 District courts may dismiss cases on forum non conveniens grounds where administrative and legal entanglements would ensue in the chosen forum.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN15 It is within the court's sound discretion to dismiss cases on forum non conveniens grounds.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN16 In determining whether to dismiss a case on the basis of forum non conveniens, a court must consider both the private interests of the litigants and the public interests of the forum. The private interests to be considered include the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Civil Procedure > ... > Diversity Jurisdiction > Alienage Jurisdiction > Citizenship

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN17 In determining whether to dismiss a case on the grounds of forum non conveniens, a court should

consider the public interests of the forum, including administrative difficulties which result from the courts' congestion; the local interest in having the controversy litigated locally; the fairness of imposing jury duty on citizens to a case which has no relationship to the forum; the interest in having the trial of a diversity case in the forum which is "at home" with the law that governs the action; and the avoidance of conflicts of laws issues or the difficulty in applying foreign law.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN18 A court must give deference to a plaintiff's chosen forum. Where the plaintiff is not a citizen of its chosen forum, the district court is entitled to be far less deferential toward his choice. However, in cases involving potential dismissal to a foreign country, the relevant inquiry is not whether the plaintiff is a citizen of the chosen forum, rather, it is whether the plaintiff is an American citizen, but American citizens do not have the absolute right to sue in an American court.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN19 A citizen's choice of forum should not be given dispositive weight. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper. The defendant may overcome this deference by demonstrating the private and public interest factors clearly point towards trial in the alternative forum.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN20 If dismissal in the plaintiffs' chosen forum would deprive them of the only court in which jurisdiction is proper, then the court may not dismiss the case based on forum non conveniens. In order to make that determination, the court must engage in a two-part test. The court must find that an alternative forum is both available and adequate. An available alternative forum exists where all parties are amenable to process and are within the forum's jurisdiction. The requirement that there be an adequate alternative forum does not require that the defendant be amenable to process in the alternative forum; consent to the forum's jurisdiction is sufficient. An alternative forum is adequate where the parties will not be deprived of all remedies or treated unfairly.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN21 A court may dismiss on forum non conveniens grounds even though the foreign forum does not provide the same range of remedies as are available in the home forum. However, the alternative forum must provide some potential avenue for redress.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN22 On a motion to dismiss on the grounds of forum non conveniens, the main factor in assessing the private interest is the convenience of the witnesses.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN23 Forum selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.

Counsel: For ALEXANDER TKACHYOV, VLADIMIR FEDULOV, SAM SHTAYNER, OLEG ATLASMAN, IGOR LERNER, SLAVA LERNER, MARITIME INVESTMENTS LTD., LIC OPERATING CORPORATION, plaintiffs: Michael Aizin, Attorney at Law, Brooklyn, NY.

For ALEXANDER TKACHYOV, VLADIMIR FEDULOV, SAM SHTAYNER, OLEG ATLASMAN, IGOR LERNER, SLAVA LERNER, MARITIME INVESTMENTS LTD., LIC OPERATING CORPORATION, plaintiffs: Craig Carnell Cunningham, Attorney, Chicago, IL.

For ANATOLY LEVIN, defendant: Martin B. Zells, Chicago, IL.

Judges: William J. Hibbler, District Judge.

Opinion by: William J. Hibbler

Opinion

MEMORANDUM AND OPINION

This is a fraud and Racketeer Influenced and Corrupt Organization Act (RICO), *18 U.S.C. § 1961 et seq.*,

cause of action by the plaintiffs, investors in a Latvian bank, against the defendants, [*2] the bank's president and others. The defendants have filed a Motion to Dismiss Based upon Forum Non Conveniens (doc. # 25), and a Motion to Dismiss the Amended Complaint Under Rule 12. The motions, having been fully briefed, are now ripe for ruling (doc. #'s 26-1, 26-2, & 26-3).

FACTS

Plaintiff Tkachyov is a Canadian resident. Plaintiffs Shtayner, Atlasman, and Igor and Slava Lerner are New York residents. Plaintiff LIC Operating Corporation is a New York corporation with its principal place of business in that state. Plaintiff Maritime Investments is a corporation with its registered office in Ireland. All named defendants are Illinois residents or corporations with their principal places of business in the state. The Reitumu Bank, which is not a party in this action but is pivotal to the analysis, is a banking institution with its principal place of business in Latvia.

The plaintiffs allege that they entered into shareholders' agreements with shareholders of the bank. As a result of those agreements, Plaintiffs elected Defendant Levin to be the bank's president and Plaintiffs Shtayner, Atlasman, and Slava Lerner to sit on the bank's Board of Directors. The plaintiffs allege [*3] that beginning in 1992, Defendant Levin breached the shareholders' agreement by refusing to consult with them, diverting profits for his personal use, receiving an increase in salary and other unauthorized compensation, fabricating service and consulting agreements with other defendants, representing a deflation in the bank's profits, and inducing transfers of the plaintiffs' shares in the bank through the use of forgery and fraud. The plaintiffs further allege that the defendants defrauded them by means of false representations and promises, false financial statements, fraudulent use of consulting agreements, and duress and intimidation in violation of RICO. Plaintiffs raise seven counts in their Amended Complaint including, breach of contract; RICO violations; common law fraud; conversion; breach of fiduciary duty; and unjust enrichment. The defendants seek to have the Amended Complaint dismissed.

Although Vladimir Fedulov is a named plaintiff in this action, the Amended Complaint contains no allegations

that he was at all harmed by the defendants conduct. Therefore, because Plaintiffs have failed to make any claims or allegations with regard to Mr. Fedulov, he is dismissed from [*4] this action.

I. Defendants' Motion to Dismiss Under Rule 12

A. Rule 12(b)(6)

1. Count I - breach of contract

Plaintiffs Shtayner, Atlasman, and Slava and Igor Lerner entered into shareholders' agreements with shareholders or investors of the bank. These plaintiffs maintain that Defendant Levin breached his duty as president of the bank by failing to comply with the terms of those agreements. Defendant Levin alleges that the plaintiffs have failed to name him as a party to these shareholders' agreements. While the plaintiffs' Amended Complaint is poorly written, confusing, and severely deficient, they did manage to allege Defendant Levin as being a party to the shareholders' agreement.¹ Defendant Levin attaches as part of his Motion to Dismiss, the controversial agreement between the shareholders and Levin. *Def's. Ex. C*. This agreement is clearly between V.I.P. International Ltd and Levin with Plaintiffs Slava Lerner, Atlasman, and Shtayner being parties to the contract. Plaintiff Igor Lerner is not party to this contract, and therefore, Plaintiffs have failed to allege that Mr. Lerner was harmed by a breach of that contract. This being the case, Plaintiff Igor [*5] Lerner is dismissed from Count I.

Defendant Levin also claims that Count I should be dismissed under Rule 8(e)(1) of the Federal Rules of Civil Procedure for setting forth lengthy and confusing conclusions regarding his conduct. Defendant Levin argues that the plaintiffs' allegations with regard to the shareholders' agreement are unclear and should therefore be dismissed. **HN1** Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." In addition, Rule 8(e)(1) states that "each averment of a pleading be simple, concise and direct." "The primary purpose of these provisions is rooted in fair notice: Under Rule 8, a complaint 'must be presented with intelligibility sufficient for a court or [*6] opposing party to understand whether a valid claim is alleged and if so what it is.'" [Vicom, Inc.](#)

¹ The Amended Complaint states "Plaintiffs ... and the [sic] defendant Anatoly Levin ... have entered into a Shareholders' or Venture or Investment Agreement in the State and City of New York between the shareholders or investors of the bank." *Pls. 'Am. Compl.* P 18.

v. Harbridge Merchant Services, Inc., 20 F.3d 771, 775 (7th Cir. 1994) (citations omitted). Thus, although the plaintiffs must show that they are entitled to relief, it is not necessary that they set out in detail the facts upon which their claim is based. *Redfield v. Continental Cas. Corp.*, 818 F.2d 596, 605 (7th Cir. 1987). Nevertheless, despite Rule 8(a)'s allowance that the complaint's statement of the claim be "short and plain," plaintiffs may not "fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint." *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993). In this case, this Court is of the opinion that the plaintiffs have met Rule 8's notice pleading requirement. Therefore, Defendant Levin's Motion to Dismiss Count I for failure to state a claim is **DENIED**.

2. Count II - breach of contract

The plaintiffs' Second Count alleges that either the individual plaintiffs or the corporate plaintiffs entered into an agreement with Defendant Levin, which Levin later [*7] breached. Defendant Levin maintains that "alternative pleadings do not allow pleading in the alternative, in one count, the claims of separate and distinct parties." *Def's. Mot. to Dismiss the Am. Compl.* at 6. Defendant Levin offers no support for this statement. This Court has found neither precedent nor statutory language which supports this statement. **HN2** Rule 8(e)(2) explicitly states "[a] party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or separate counts or defenses." Fed. R. Civ. P. 8(e)(2). This Court interprets this language to be in contradiction of the defendant's contention. There is a long history in this circuit which supports this Court's view. See *Brown v. United States*, 976 F.2d 1104 (7th Cir. 1992); *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357 (7th Cir. 1990); *Tibor Mach. Products, Inc. v. Freudenberg-NOK General Partnership*, 967 F. Supp. 1006 (N.D. Ill. 1997); *Perlman v. Zell*, 938 F. Supp. 1327 (N.D. Ill. 1996). But see *Gr. Lakes Higher Educ. Corp. v. Austin Bank of Chicago*, 837 F. Supp. 892 (N.D. Ill. 1993). [*8] This Court finds the pleadings to put Defendant Levin on notice that a group of plaintiffs entered into an agreement with him which was later breached. Therefore, Defendant Levin's Motion to Dismiss the Plaintiffs' Second Count for failure to state a claim is **DENIED**.

3. Count III - RICO

Plaintiff's Third Count is a RICO claim against the defendants. It is the plaintiffs' contention that Defendant

Levin made false representations, submitted false financial statements, diverted the bank's earnings, profited from low and no interest loans, and used intimidation and duress to force plaintiffs to sell their interest in the bank. *Pls. 'Am. Compl.* P55. The plaintiffs contend that these schemes "were perpetuated by the defendant Levin [sic] and other defendants" against the plaintiffs. *Id.* P 56. The plaintiffs do not elaborate on how the other named defendants perpetuated the racketeering enterprise other than by stating that Defendant Levin entered into fraudulent consulting agreements with the other defendants in furtherance of the RICO conspiracy. *Id.* P64. Defendant Levin claims that this Court should be dismissed because it "is deficient in failing to set forth with [*9] sufficient particularity the alleged violation." *Def's. Mot. to Dismiss the Am. Compl.* at 6.

HN3 Rule 9(b) of the Federal Rules of Civil Procedure requires that fraud be plead with particularity. **HN4** In RICO causes of action, the plaintiff must "state the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Vicom, Inc.*, 20 F.3d at 777. (citations omitted) (internal quotation omitted). This is especially true in cases such as this one where there are multiple defendants. In those circumstances, "the complaint should inform each defendant of the nature of his alleged participation in the fraud." *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2nd Cir. 1987). The plaintiffs' Amended Complaint fails to satisfy the specificity requirements of Rule 9(b). Further, this Court is of the opinion that plaintiffs' lack standing to bring this RICO claim. **HN5** It is well settled that shareholders of a corporation do not have standing as individuals to bring a RICO action for a loss in their stock's value which was [*10] the result of the alleged racketeering activities conducted against the corporation. *Esposito v. Soskin*, 11 F. Supp. 2d 976, 978-979 (N.D. Ill. 1998). Only the directly injured party, rather than individual shareholders, may bring claims under RICO. *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1178-1179 (7th Cir. 1989); *Esposito*, 11 F. Supp. 2d at 978-979; *Mid-State Fertilizer Co. v. Exch. Nat. Bank of Chicago*, 693 F. Supp. 666 (N.D. Ill. 1988). "They face the problem that they cannot rely on the indirect injury they suffer as a result of their being shareholders ... of a corporation that suffers direct injury." *Mid-State*, 693 F. Supp. at 673. The court in *Esposito* found that injuries alleged by the plaintiffs, such as the defendant stealing from the corporation,

keeping the corporation undercapitalized, entrenching himself as president of the corporation, and misrepresenting the corporation's financing to the authorities, were in fact injuries suffered by the corporation itself, and as such, Plaintiffs lacked standing to bring the RICO suit. *Esposito* is analogous to the case at bar. In [*11] this case, the plaintiffs attempt to claim that making false representations and financial statements, establishing false consulting arrangements, diverting profits, profiting from improper loans, and defrauding the plaintiffs into selling their shares constitute racketeering in violation of RICO. This Court disagrees, and as such, the plaintiffs' RICO claim in Count III is **DISMISSED**.

4. Count IV - common law fraud

The plaintiffs' Fourth Count is a common law fraud claim under Illinois law. The plaintiffs allege that Defendant Levin made false statements of a material nature, these statements were known by Defendant Levin to be untrue, they were made for the purpose of inducing reliance by the plaintiffs, and the plaintiffs' reliance led to substantial injury. *Pls.' Am. Compl.* PP 73-74. Defendant Levin counters that the plaintiffs have failed to state a common law fraud claim under Illinois law. **HN6** "To plead a legally sufficient common law fraud claim, a plaintiff must allege that: (1) defendant made a statement; (2) of a material nature; (3) which was untrue; and (4) was known by defendant to be untrue, or was made in culpable ignorance of its truth or falsity; (5) was made [*12] for the purpose of inducing reliance by the plaintiff; (6) was actually relied on by the plaintiff; and (7) resulted in the plaintiff's injury." *Small v. Sussman*, 306 Ill. App. 3d 639, 239 Ill. Dec. 366, 713 N.E.2d 1216, 1221 (Ill. App. Ct. 1999). This Court finds that plaintiffs have sufficiently pled the elements of common law fraud in their Amended Complaint. Therefore, Defendant Levin's motion is **DENIED** with respect to Count IV.

5. Count V - conversion

The plaintiffs' Fifth Count alleges that the defendants converted Plaintiffs' interest in the bank. Defendant Levin argues that this allegation is insufficient under Rule 8(e)(1) & (2). This Court agrees with Defendant Levin's argument. **HN7** "A proper complaint alleging conversion sets forth facts showing: (1) an unauthorized and wrongful assumption of control, dominion, or ownership by a defendant over a plaintiff's personalty; (2) plaintiff's right in the property; (3) plaintiff's right to the immediate possession of the property; and (4) a

demand for possession of the property." *Small*, 713 N.E.2d at 1222. Plaintiffs' Fifth Count is inadequate to make a claim of conversion under the notice requirement of Rule 8(e). [*13] Therefore, Defendant Levin's Motion to Dismiss Count V for failure to state a claim is **GRANTED**.

6. Count VI - breach of fiduciary duty

The plaintiffs allege that Defendant Levin breached his fiduciary duty to them as shareholders of the bank. Defendant Levin maintains that there are no facts given in the Amended Complaint which would establish a fiduciary relationship. This Court finds that the plaintiffs have sufficiently stated a claim of breach of fiduciary duty. **HN8** Under Illinois law, it has long been established that a single controlling shareholder owes fiduciary duties to other shareholders in the corporation. *Cafcas v. DeHaan & Richter, P.C.*, 699 F. Supp. 679, 683 (N.D. Ill. 1988). In small corporations, the duties of a majority shareholder to a minority shareholder are similar to those of a partner. Thus, shareholders are bound to exercise their rights and perform their duties with the highest degree of honesty and good faith. *Id.* at 684; *Hagshenas v. Gaylord*, 199 Ill. App. 3d 60, 557 N.E.2d 316, 322-23, 145 Ill. Dec. 546 (Ill. App. Ct. 1990); *Jaffe Commercial Finance Co. v. Harris*, 119 Ill. App. 3d 136, 456 N.E.2d 224, 230, 74 Ill. Dec. 722 (Ill. App. Ct. 1983).

[*14] **HN9** Majority shareholders are also prohibited from enhancing their personal interests at the expense of the corporation's interests. *Id.*

HN10 Generally, a breach of a fiduciary duty claim belongs to the corporation, and not an individual shareholder. Fed. R. Civ. Pro. 23.1. However, in limited circumstances, individual shareholders may bring suit to enforce a corporate cause of action against officers, directors, and third parties. *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 95, 114 L. Ed. 2d 152, 111 S. Ct. 1711 (1991), on remand, 939 F.2d 458 (7th Cir. 1991); *Air Line Pilots Ass'n Int'l v. UAL Corp.*, 717 F. Supp. 575, 578 (N.D. Ill. 1989), aff'd, 897 F.2d 1394 (7th Cir. 1990). When an injury is suffered directly by an individual shareholder, or relates directly to an individual's stock ownership, the action is personal. *Seidel v. Allegis Corp.*, 702 F. Supp. 1409, 1411 (N.D. Ill. 1989). Therefore, Defendant Levin's Motion to Dismiss the Sixth Count is **DENIED**.

7. Count VII - unjust enrichment

Plaintiffs have pled both a breach of contract in previous counts, and alternatively, unjust enrichment [*15] under

Count VII. Defendant Levin argues "where there is a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application." *Def's. Mot. to Dismiss the Am. Compl.* at 15. The defendant's assertion is completely wrong under prevailing Seventh Circuit precedent. As has been previously stated, plaintiffs may make alternative and contradictory claims in their Complaint under Rule 8(e). Courts in this Circuit have consistently held that **HN11** plaintiffs may plead both breach of contract and unjust enrichment alternatively in a single complaint. *Quadion Corp. v. Mache*, 738 F. Supp. 270, 278 (N.D. Ill. 1990); *Braman v. Woodfield Gardens Assoc., Realcorp Investors Inc.*, 715 F. Supp. 226, 229 (N.D. Ill. 1989); *Gordon v. Matthew Bender & Co., Inc.*, 562 F. Supp. 1286, 1298-1299 (N.D. Ill. 1983). This Court will construe the alternative pleadings of a breach of contract or unjust enrichment to be within the ambit of Rule 8(e). Defendant Levin also argues that the plaintiffs have failed to state a claim for unjust enrichment because they have failed to demonstrate that he accepted a benefit which [*16] was unequitable for him to retain without payment. *Def's. Mot. to Dismiss the Am. Compl.* at 15. Plaintiffs' sole allegation under Count VII is that Defendant Levin has been unjustly enriched. This Court finds that, although this statement leaves a lot to be desired, it meets the requirements of Rule 8(e). Therefore, Defendant Levin's Motion to Dismiss Count VII is **DENIED**.

B. Rule 12(f) & Rule 12(e)

Defendant Levin's Motion to Dismiss includes a Motion to Strike under Rule 12(f) and a Motion for a More Definite Statement under Rule 12(e). Because this Court has found that the plaintiffs have satisfied the pleading requirements of Rule 8, Defendant's alternative motions under Rule 12 are **DENIED**.

II. DEFENDANT'S MOTION TO DISMISS FOR FORUM NON CONVENIENS

Defendant Levin has also filed a Motion to Dismiss the Plaintiffs' Amended Complaint Based upon Forum Non Conveniens. The defendant argues that Latvia, the country where the bank was organized, is the proper forum for this action. The plaintiffs dispute this contention, and instead request that this Court deny the defendant's motion and retain jurisdiction over this matter.

HN12 Under the principle of forum [*17] non conveniens, a district court may dismiss a suit which it has jurisdiction

over if, in the ends of justice, it best serves the convenience of the parties. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 91 L. Ed. 1055, 67 S. Ct. 839 (1947). **HN13** A district court may dismiss a case when an alternative forum has jurisdiction, and when a trial in the plaintiffs' chosen forum would burden the defendant to a degree that cannot be outweighed by the plaintiffs' convenience. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981). Alternatively, **HN14** district courts may dismiss cases on forum non conveniens grounds where administrative and legal entanglements would ensue in the chosen forum. *Id.* **HN15** It is within this Court's sound discretion to dismiss cases on forum non conveniens grounds. *Piper*, 454 U.S. at 254.

HN16 In determining whether to dismiss a case on the basis of forum non conveniens, this Court must consider both the private interests of the litigants and the public interests of the forum. *Gulf Oil*, 330 U.S. at 508. The private interests to be considered include the

relative ease of [*18] access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Id.

HN17 This Court should also consider the public interests of the forum, including administrative difficulties which result from the courts' congestion; the local interest in having the controversy litigated locally; the fairness of imposing jury duty on citizens to a case which has no relationship to the forum; the interest in having the trial of a diversity case in the forum which is "at home" with the law that governs the action; and the avoidance of conflicts of laws issues or the difficulty in applying foreign law. *Id.* at 508-509.

HN18 This Court must give deference to a plaintiff's chosen forum. *Piper Aircraft*, 454 U.S. at 255. Where the plaintiff is not a citizen of its chosen forum, the district "court is entitled to be far less deferential [*19] toward his choice." *Interpane Coatings, Inc. v. Australia & New Zealand Banking Group, Ltd.*, 732 F. Supp. 909 (N.D. Ill. 1990). However, in cases involving potential dismissal to a foreign country, the relevant inquiry is not

whether the plaintiff is a citizen of the chosen forum, rather, it is whether the plaintiff is an American citizen, but American citizens do not have the absolute right to sue in an American court. *Id.* **HN19** "A citizen's choice of forum should not be given dispositive weight. ...As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." [Piper Aircraft, 454 U.S. at 256](#). (citations omitted). The defendant may overcome this deference by demonstrating the "private and public interest factors clearly point towards trial in the alternative forum." [Macedo v. Boeing Co., 693 F.2d 683, 688 \(7th Cir. 1982\)](#).

A. Availability of Adequate Alternate Forum

It is Defendant Levin's contention that Latvia provides an adequate forum for this cause of action. The defendant has provided a copy of the Latvian Code, which [*20] provides that the plaintiff in this instance may seek redress in the Latvian courts. *Def.'s Ex. G* Defendant Levin has also provided this Court with the guarantee that he will make himself amenable to suit in Latvia and will submit to all conditions placed upon him by this Court. The plaintiffs counter that Latvia is an improper forum to adjudicate this action because Latvia does have a provision for RICO similar to that of the United States. While the Court does not dispute this statement, the plaintiffs' RICO claims have been dismissed, therefore, this argument cannot stand.

HN20 If dismissal in the plaintiffs' chosen forum would deprive them of the only court in which jurisdiction is proper, then this Court may not dismiss the case based on forum non conveniens. [Ludgate Ins. Co. Ltd. v. Becker, 906 F. Supp. 1233 \(N.D. Ill. 1995\)](#). In order to make that determination, this Court must engage in a two-part test. This Court must find that an alternative forum is both available and adequate. [Kamel v. Hill-Rom Co., Inc., 108 F.3d 799, 802 \(7th Cir. 1997\)](#). An available alternative forum exists where "all parties are amenable to process and are within the [*21] forum's jurisdiction." *Id.* at 803. "The requirement that there be an adequate alternative forum 'does not require that the defendant be amenable to process in the alternative forum; consent to the forum's jurisdiction is sufficient.'" [Ludgate, 906 F. Supp. at 1236](#). An alternative forum is adequate where "the parties will not be deprived of all remedies or treated unfairly." [Hill-Rom, 108 F.3d at 803](#). In this case, Defendant Levin has consented to Latvia's jurisdiction. As the Latvian Code and the defendant's

affidavits of Latvian lawyers expressly state, Latvian law would provide an available forum to litigate this action.

The plaintiffs maintain that an adequate forum is unavailable in Latvia. The plaintiffs base this contention on the affidavit of a Latvian attorney, which state that the applicable laws are rooted in Communist history and doctrine. The plaintiffs' expert states that the United States federal court system is a superior forum because many of the Latvian laws remain untested and are subject to corruption. While this Court sympathizes with the plight of the Eastern European nations, the fact that plaintiffs will get [*22] better service on home soil is not per se determinative. **HN21** "A court may dismiss on forum non conveniens grounds even though the foreign forum does not provide the same range of remedies as are available in the home forum. However, the alternative forum must provide some potential avenue for redress." *Id.* (citing [Ceramic Corp. of America v. Inka Maritime Corp. Inc., 1 F.3d 947, 949 \(9th Cir. 1993\)](#)). Such is the case here. Therefore, this Court finds that an available and adequate forum exists in Latvia.

B. Private Interests Factors

HN22 "The main factor in assessing the private interest is the convenience of the witnesses." [Interpane, 732 F. Supp. at 916](#). Although the plaintiffs are residents of, or incorporated in, New York, and the defendants are Illinois residents or corporations, at least one key figure in this litigation is a Latvian citizen. Plaintiffs repeatedly refer to Leonid Esterkin's involvement in the events giving rise to this suit. Mr. Esterkin was a party to many of the controversial contracts and his testimony will most likely be key to this litigation. Mr. Esterkin cannot be compelled to testify in this Court, however, he is subject [*23] to process in Latvia. Even if this Court could compel Mr. Esterkin to testify, the cost of obtaining his testimony would be prohibitive. "The lack of availability of the compulsory process over [Mr. Esterkin] and the expense involved in securing [his] testimony is a significant factor pointing toward dismissal." [McDonald's Corp. v. Bukele, 960 F. Supp. 1311, 1319 \(N.D. Ill. 1997\)](#). Defendant Levin also maintains that he would be hindered in this litigation because many other witnesses reside in Latvia. In addition to a critical witnesses residing in Latvia, most, if not all discovery will take place there. "To run discovery from this federal district would be cost prohibitive to say the least." [Interpane, 732 F. Supp. at 916](#). Finally, Defendant Levin has provided documents that show the plaintiffs have

demonstrated their willingness to pursue a suit against the bank itself. This Court is of the opinion that it does not have personal jurisdiction over the bank, and therefore, plaintiffs intent is to sue the bank in Latvia. The plaintiffs deny this allegation, but at least two letters sent by plaintiffs' counsel to the bank express an intent to sue. [*24] In fact the letters regard, "*LIC Operating Corporation v. Reitumu Banka*," and "*Maritime Investments Limited v. Reitumu Banka*." This Court acknowledges the fact that although presently, the plaintiffs have not brought suit against the bank, they have expressed a willingness and intent to do so. The issues presented by the plaintiffs against the bank and Defendant Levin are identical, and the evidence presented will undoubtedly be the same. Therefore, the private factors in this case weigh in favor of dismissal.

C. Public Interest Factors

There can be no question that the Northern District of Illinois has no interest in this litigation. The only conceivable interest in this case may be that the defendants are either residents or incorporated here. Otherwise, this case is about the alleged fraud of New York residents who invested in a foreign bank. This being the case, there is no localized controversy. Another critical factor is the choice of law which would be applied to the case. The bank's Article of Incorporation contain a choice of law provision that "legal relationships between the Bank and its shareholders are regulated by Law of Latvian Republic." *Def.'s Ex. [*25] C § 1.6. "The enforceability of forum selection clauses in international agreements is governed by the Supreme Court's decision in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972).* In enforcing a forum selection clause in a contract between Zapata, an American corporation, and Unteweser, a German corporation, the Court held that **HN23** forum selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *Bonny v. Society of Lloyd's*, 3 F.3d 156, 159 (7th Cir. 1993) (internal citations omitted) (internal quotations omitted). The Court's reasoning in *Zapata* was that,

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Zapata, 407 U.S. at 9. Further, the "elimination of all such [*26] uncertainties by agreeing parties in advance upon a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id. at 13-14*. In this case, this Court is of the opinion that the choice of law provision should stand. Furthermore, this Court has no familiarity with Latvian law. Therefore, dismissal of the suit on forum non conveniens grounds is proper.

III. CONCLUSION

This Court, having considered both of the defendant's motions and the plaintiffs' objections to the same, rules that Defendant Levin's Motion to Dismiss the Amended Complaint Based upon Forum Non Conveniens (doc. # 25-1) is **GRANTED**. Defendant Levin's Motion to Dismiss the Amended Complaint under Rule 12 (doc. # 's 26-1, 26-2, & 26-3) is **DENIED** in part and **GRANTED** in part. Plaintiff Fedulov is **dismissed** from this cause of action. Plaintiff Igor Lerner is **dismissed** from Count I. Counts III and V of Plaintiffs' Amended Complaint are **dismissed**. All other Counts of Plaintiffs Amended Complaint comply with the standards addressed herein, and therefore, Counts I and II, as well as Counts IV, VI, and VII of the Amended [*27] Complaint stand.

IT IS SO ORDERED.

DATED: September 24TH, 1999

William J. Hibbler, District Judge

 Caution
As of: October 12, 2015 10:27 AM EDT

CPS Int'l v. Dresser Indus.

Court of Appeals of Texas, Eighth District, El Paso

May 4, 1995, Decided

No. 08-93-00250-CV

Reporter

911 S.W.2d 18; 1995 Tex. App. LEXIS 971

CPS INTERNATIONAL, INC., and CREOLE PRODUCTION SERVICES, INC., Appellants, v. DRESSER INDUSTRIES, INC., DRESSER A.G. (VADUZ), DRESSER RAND ARABIAN MACHINERY, LTD, f/d/b/a DRESSER AL-RUSHAID MACHINERY COMPANY, LTD., ABDULLAH RUSHAIDAL-RUSHAID, AL-RUSHAID TRADING CORPORATION, AL-RUSHAID GENERAL TRADING CORPORATION, and AL-RUSHAID INVESTMENT COMPANY, Appellees.

Subsequent History: **[**1]** As Corrected June 19, 1995.

Prior History: Appeal from the 334th Judicial District Court of Harris County, Texas. (TC# 88-46399).

Core Terms

parties, trial court, summary judgment, choice of law clause, tort claim, contracts, disputes, cause of action, contractual, contract claim, arbitration, tortious interference, arbitration clause, choice of law provision, provides, clauses, breach of fiduciary duty, conflict of laws, public policy, documents, principles, applies, bylaws, issues, civil conspiracy, question of law, choice of law, misappropriation, conspiracy, overrule

Case Summary

Procedural Posture

In an action for breach of contract and for business torts, appellant domestic corporation sought review of a decision from the Judicial District Court of Harris County (Texas), which granted summary judgment to appellees, foreign corporation and individual, finding that Saudi Arabian law controlled the case.

Overview

Appellant, a Delaware corporation, had its headquarters in Texas and a subsidiary in Panama. It entered into multiple contracts with appellees, a Saudi Arabian citizen and a Saudi Arabian corporation. Appellant sued appellees in Texas for breach of contract and multiple business torts. Appellees filed a motion for summary judgment. The trial court granted the motion for summary judgment, finding that Saudi Arabian law controlled and that Saudi Arabian law did not recognize appellant's causes of action. Appellant sought review. The court affirmed in part and reversed in part. The court affirmed the grant of summary judgment as it pertained to the tort claims. The court found that under the most significant relationship test, Saudi Arabian law applied because the injury occurred in Saudi Arabia, the conduct occurred in Saudi Arabia, and Saudi Arabia was the place of business of one of the parties and the place where the relationship was centered. The court reversed the grant of summary judgment on appellant's claim for breach of contract because one of the contracts contained a choice of law provision which stated that United States law would apply.

Outcome

The court affirmed the grant of summary judgment in part and found that Saudi Arabian law applied to the tort issue. The court reversed and remanded the grant of summary judgment on the breach of contract issue because the contracts specified that United States law would apply.

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 The standard of review on appeal is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that a judgment should be granted as a matter of law. Thus, the question on appeal is not whether the summary judgment proof raises fact issues as to required elements of the movant's cause or claim, but whether the summary judgment proof establishes, as a matter of law, that there is no genuine issue of material fact as to one or more elements of the movant's cause or claim. In resolving the issue of whether the movant has carried this burden, all evidence favorable to the non-movant must be taken as true and all reasonable inferences, including any doubts, must be resolved in the non-movant's favor. When the defendants are the movants and they submit summary evidence disproving at least one essential element of each of plaintiff's causes of action, then summary judgment should be granted.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

International Law > Dispute Resolution > General Overview

International Law > Dispute Resolution > Tribunals

HN2 [Tex. R. Evid. 203](#) informs that the determination of the content of foreign law is a question of law for the court. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN3 The determination of which state's law will apply to a case is a question of law.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Contracts Law > Contract Interpretation > General Overview

HN4 In every forum, a contract is governed by the law with a view to which it was made. This principle derives from the most basic policy of contract law, which is the protection of the justified expectations of the parties. The parties' understanding of their respective contractual rights and obligations depends in part upon the certainty with which they may predict how the law will interpret and enforce their agreement.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Contracts Law > Contract Interpretation > General Overview

HN5 When parties to a contract reside or expect to perform their respective obligations in multiple jurisdictions, they may be uncertain as to what jurisdiction's law will govern construction and enforcement of the contract. To avoid this uncertainty, they may express in their agreement their own choice that the law of a specified jurisdiction apply to their agreement. Judicial respect for their choice advances the policy of protecting their expectations. This conflict of laws concept has come to be referred to as party autonomy. However, the parties' freedom to choose what jurisdiction's law will apply to their agreement cannot be unlimited. They cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement. And they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply. So limited, party autonomy furthers the basic policy of contract law.

Commercial Law (UCC) > ... > Application & Construction > Choice of Law > General Overview

HN6 See [Tex. Bus. & Com. Code Ann. § 1.105\(a\)](#).

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Contracts Law > Contract Interpretation > General Overview

HN7 The law of the state chosen by parties to govern contractual rights and duties will be applied if the issue is one which parties could have resolved by an explicit provision in their agreement directed to that issue. The law of the state chosen by parties to govern their contractual rights and duties will be applied, even if the issue is one which parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for parties' choice, or application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, would be the state of the applicable law in the absence of an effective choice of law by the parties. In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Torts > Procedural Matters > Conflict of Law > General Overview

Torts > Procedural Matters > Conflict of Law > Significant Relationships

HN8 All conflicts cases sounding in tort are governed by the "most significant relationship" test.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN9 A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. When there is no such directive, the factors relevant to the choice of the applicable rule of law include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of

those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Torts > Procedural Matters > Conflict of Law > General Overview

Torts > Procedural Matters > Conflict of Law > Significant Relationships

HN10 The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties. Contacts to be taken into account in applying the principles to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.

Counsel: For Appellants: Hon. Rufus Wallingford, Hon. Lee Haag, Hon. Jeff Cody, Hon. William J. Boyce, Fulbright & Jaworski, L.L.P., Houston, TX.

For Appellees: Hon. Robert M. Hardy, Jr., Hughes & Luce, L.L.P., Houston, TX. Hon. Parker C. Folse, III, Susman Godfrey, Houston, TX.

Judges: Before Panel No. 3, Barajas, C.J., Larsen and McCollum, JJ. (McCollum J., not participating)

Opinion by: RICHARD BARAJAS

Opinion

[*19] OPINION

This is an appeal from a summary judgment dismissing Appellants' claims for breach of contract, breach of fiduciary duty, misappropriation of trade secrets, tortious interference with contractual relations, and civil conspiracy. The trial court found Saudi Arabian law controlling and dismissed the case after concluding that

Saudi Arabian law did not recognize Appellants' causes of action. We affirm in part and reverse in part. We further remand Appellants' claims for breach of contract to the trial court for a new trial.

I. SUMMARY OF THE EVIDENCE

Critical to our decision is the complex set of relationships that existed between the parties at various times and each party's **[**2]** conduct with regard to those relationships. We therefore set out these relationships and chronicle the parties' conduct in some detail.

[*20] A. The Parties

Appellants are a Delaware corporation (Creole) with its headquarters and principal place of business in Houston, Texas, and its wholly owned subsidiary, a Panamanian corporation. Appellants provide project management, maintenance, repair, installation, overhaul, design, and other services in connection with compressors, pumps, turbines, engines, and related equipment used in the energy and refining industry. Creole has no offices outside the United States. Although Creole provides (from its Houston headquarters) to CPS all physical facilities, employees, resources, and capabilities to enable CPS to provide services, CPS is not registered to conduct business in Texas or any other state of the United States, nor does it have any offices in the United States. The record shows, in accordance with a judicial decision in a previous federal anti-trust lawsuit, that Creole was formed by CPS to operate outside the United States, while Creole performs essentially the same work in the United States.

Appellee Abdullah Rushaid Al-Rushaid **[**3]** is a Saudi Arabian citizen and businessman. Appellees Al-Rushaid Trading Corporation (ARTC), Al-Rushaid General Trading Corporation (ARGTC), and Al-Rushaid Investment Company (ARIC) are Saudi Arabian business entities and the business interests of Abdullah Rushaid Al-Rushaid.¹ Appellants sued the Al-Rushaid Appellees for breach of contract, breach of fiduciary duty, misappropriation of trade secrets, and conspiracy.

Appellee Dresser Industries, Inc., is a Delaware corporation with its headquarters and principal place of business in Houston, Texas. Appellee Dresser A.G.

(Vaduz) is a Liechtenstein corporation and a wholly owned subsidiary of Appellee Dresser Industries. We shall refer to these entities collectively as the Dresser Appellees. Appellants sued the Dresser Appellees for tortious **[**4]** interference with contractual relations and conspiracy.

In 1978, CPS and Abdullah Rushaid Al-Rushaid formed a Saudi Arabian company called Creole Al-Rushaid, Ltd. (CARL), whose purpose was to conduct business in Saudi Arabia. This business relationship was embodied in a writing called the Contract of Kriol El Rashid Company, Ltd. (the Kriol contract). Three other contracts accompanied the Kriol contract: (1) a Working Agreement, which provides for a 70-30 ownership division between CPS and ARGTC; (2) a Technical Assistance Agreement, which provides for the supply of staff, technical, and other resources to CARL; and (3) a Loan Agreement, under which CPS agreed to loan two million Saudi Riyals to CARL, apparently to satisfy initial capitalization requirements of Saudi Arabian law.

In 1981, Dresser A.G. (Vaduz) and ARIC formed Dresser Al-Rushaid Machinery Company, Ltd. (DARMCO), a Saudi Arabian company whose purpose was to conduct business in Saudi Arabia. Appellants sued DARMCO for tortious interference with contractual relations and conspiracy.

B. The Conduct

CARL was formed to satisfy the requirements for qualifying to do business in Saudi Arabia. Appellants' CEO, Richard **[**5]** Flowers, understood that CARL would be formed under Saudi Arabian law and would have to abide by the law of Saudi Arabia. Flowers several times traveled to Saudi Arabia to meet with Al-Rushaid for the purpose of setting up a Saudi Arabian company in accordance with Saudi Arabian law. On one of these visits, Flowers met with Al-Rushaid's lawyer, Ahmed Audhali. Audhali explained to Flowers that Saudi Arabian law required disputes to be brought in a Saudi Arabian forum. He further explained that a CPS representative would have to sign before a Saudi Arabian notary a Memorandum of Association, which sets out the foregoing requirements and operates as the company's charter after publication in the Saudi Arabian Official Gazette.

CARL's articles of association provide that it will operate under the laws of Saudi Arabia, that disputes will be

¹ Although Al-Rushaid is never unambiguous, he states in one pleading that he "does business as" ARTC and ARIC. We shall refer to Al-Rushaid and his affiliated business interests collectively as the Al-Rushaid Appellees.

submitted to arbitration [*21] in Saudi Arabia and, if arbitration fails, they will be resolved in Saudi Arabia. CARL was intended to operate exclusively in Saudi Arabia and never conducted operations outside Saudi Arabia. Appellants claim that the Al-Rushaid Appellees' violated contractual and other duties they owed to Appellants by their involvement with [**6] the Dresser Appellees and that the Dresser Appellees conspired to and did interfere with Appellants' relations with the Al-Rushaid Appellees.

C. The Litigation

In 1983, both CPS and Al-Rushaid stated they wished to dissolve CARL. Dissolution under Saudi Arabian law, however, proved cumbersome and difficult, and Appellants accuse Al-Rushaid of deliberately slowing the process.

In 1985, CPS brought a federal anti-trust action against Dresser Industries and the Al-Rushaid defendants, claiming a conspiracy to drive CPS out of the Saudi Arabian market. This suit was dismissed the following year for lack of a sufficient impact on United States commerce. Before dismissal, Appellants collectively filed a separate suit in the same court against all present Appellees. This second federal suit was dismissed in 1988, the court finding that "if there are any anticompetitive effects, surely they are in Saudi Arabia, where CARL was eliminated as a competitor." In finding only a tenuous relationship between the United States and the subject matter of the suit, the court reasoned that it concerned merely the "decline of a Saudi joint venture [that] indirectly affected the parent company [**7] [Creole] whose foreign subsidiary [CPS] participated in the venture."

In 1985, CPS also brought suit in a Saudi Arabian court against Al-Rushaid for breach of contract, breach of fiduciary duty, misappropriation of confidential information, and conspiracy. The cause was heard by a three-judge panel of the court, which deemed the claims not actionable under Saudi law, but went on to seek alternative methods to resolve the dispute. Both sides agreed before the court to settle the suit, Al-Rushaid agreeing to cooperate in CARL's dissolution and CPS agreeing to drop the then pending federal anti-trust suit. This agreement is contained in a letter from CPS to Al-Rushaid, which letter was notarized by a Texas notary, the Texas Secretary of State, and verified by United States Secretary of State George P. Schultz.

II. DISCUSSION

Appellants attack the judgment of the trial court in three points of error that challenge the dismissal of Appellants' claims against the (1) Dresser Appellees, (2) DARMCO, and the (3) Al-Rushaid Appellees. Because our disposition of Appellants' contract claims differs from our resolution of their tort claims, we necessarily segregate our discussion [**8] of them. We treat Appellants' breach of contract claims in our contract analysis, and address Appellants' remaining claims in our tort analysis.

A. Standard of Review

We begin with the traditional standards employed to review a summary judgment. **HN1** The standard of review on appeal is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that a judgment should be granted as a matter of law. [Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 471 \(Tex. 1991\)](#); [Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548 \(Tex. 1985\)](#); [Hernandez v. Kasco Ventures Inc., 832 S.W.2d 629, 631 \(Tex.App.--El Paso 1992, no writ\)](#). Thus, the question on appeal is not whether the summary judgment proof raises fact issues as to required elements of the movant's cause or claim, but whether the summary judgment proof establishes, as a matter of law, that there is no genuine issue of material fact as to one or more elements of the movant's cause or claim. [Gibbs v. General Motors, 450 S.W.2d 827, 828 \(Tex. 1970\)](#). In resolving the issue of whether the movant has carried this burden, all evidence favorable to the non-movant [**9] must be taken as true and all reasonable inferences, including any doubts, must be resolved in the non-movant's favor. [Nixon, 690 S.W.2d at 548-49](#); [Stoker v. Furr's, Inc., 813 S.W.2d 719, 721 \(Tex.App.--El Paso 1991, writ denied\)](#). When, as here, the defendants are the movants and [*22] they submit summary evidence disproving at least one essential element of each of plaintiff's causes of action, then summary judgment should be granted. [Perez, 819 S.W.2d at 471](#); [Bradley v. Quality Service Tank Lines, 659 S.W.2d 33, 34 \(Tex. 1983\)](#); [Hernandez, 832 S.W.2d at 633](#).

Our research has yielded no case addressing the propriety of using summary judgment standards to review a conflict of laws issue. Appellants urge us to employ the foregoing standards to review the two primary issues presented by the instant case: (1) whether Saudi Arabian law applies to Appellants' claims and, if Saudi law applies to any claims, (2) the outcome

of those claims under Saudi law. Although they might be awkwardly applied to the instant case, we think the traditional summary judgment standards either are inapplicable or require some modification because of the nature of the issues presented to the trial **[**10]** court for decision.

Our inclination to use traditional summary judgment standards is greatest with respect to the second primary issue because the task of determining foreign law intuitively strikes us as a factual inquiry into the content or text of foreign rules of law. **HN2** [Texas Rules of Evidence 203](#) informs us, however, that the determination of the content of foreign law is a question of law for the court². Thus, although one might label the parties' dispute over the second primary issue a disagreement over the "fact" of what Saudi Arabian law says, [Rule 203](#) makes clear that the determination of the content of Saudi law is a question of law. Accordingly, the better inquiry is not whether there existed a fact question regarding the content of Saudi law, but whether the trial court reached a proper legal conclusion about its content. Any fact question presented by evidence of the content of Saudi law was for the trial court to resolve because [Rule 203](#) commits to the trial court the exclusive responsibility to discern foreign law.

[11]** On the parties' motion, the trial court in the case at hand conducted a separate hearing to determine foreign law wherein the court heard expert testimony, the substance of which reappeared in affidavit form in later summary judgment motions. We find the application of traditional summary judgment standards inappropriate because a reversal for a mere factual conflict would result in the remand of the case to the trial court, which would simply repeat the procedures it used to determine foreign law without regard to any identified factual conflict. Whether presented before summary judgment, simultaneously with it, or during trial, the

issue is one for the trial court to resolve. We see no virtue in employing a standard of review that increases the potential for forcing the trial court to conduct duplicative procedures because of a factual controversy when it is the same trial court that will eventually be called upon to resolve that controversy.

Similarly, the Texas Supreme Court has deemed **HN3** the determination of which state's law will apply to a case to be a question of law. See [Duncan v. Cessna Aircraft Co.](#), 665 S.W.2d 414, 421 (Tex. 1984) ("The question of which state's law will **[**12]** apply is one of law.") For the same reasons, then, we also think summary judgment standards inappropriate for use in reviewing the trial court's determination that Saudi Arabian law applied to this litigation.

Although we are committed to the foregoing analysis, we apply it only to review the judgment of the trial court with respect to the first primary issue, the applicability of Saudi Arabian law, because we are equally committed to the jurisprudential canon that appellate courts, especially intermediate appellate courts, should fashion new law in disposing of a case only when the facts of the case do not present grounds for decision based on already established principles. We therefore use traditional summary judgment **[*23]** principles to review the trial court's judgment with respect to the second primary issue, the outcome of Appellants' claims under Saudi Arabian law, because we find that the summary judgment evidence bearing on this issue is not in conflict. Accordingly, we review the trial court's determination of the first issue as a question of law and review its determination of the second issue as a conventional summary judgment³.

[13] B. Contract Claims**

The Texas Supreme Court has addressed what effect should be given to contractual choice of law provisions with respect to claims sounding in contract.

² The rule reads in pertinent part:

The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises.... **The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.**

(emphasis added).

³ We recognize that summary judgment is most appropriate when the only disputed issues are questions of law, and we do not imply otherwise. We mean only that a question of law is less sensitive to extant factual controversies because it is the trial court that must resolve them, while summary judgment with respect to issues not exclusively committed to the trial court is precluded by any genuine issue of material fact.

We begin with what Chief Justice Marshall referred to as a principle of "universal law ... that, **HN4** in every forum, a contract is governed by the law with a view to which it was made." [Wayman v. Southard, 23 U.S. 1, 6 L. Ed. 253 \(1825\)](#). This principle derives from the most basic policy of contract law, which is the protection of the justified expectations of the parties. See E. SCOLES & P. HAY, CONFLICT OF LAWS 632 (1984) ["SCOLES"]; Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM.J. TRANSNAT'L L. 1, 21 (1977). The parties' understanding of their respective contractual rights and obligations depends in part upon the certainty with which they may predict how the law will interpret and enforce their agreement. *Id.*

HN5 When parties to a contract reside or expect to perform their respective obligations in multiple jurisdictions, they may be uncertain as to what jurisdiction's law will govern construction and enforcement of the contract. To avoid **[**14]** this uncertainty, they may express in their agreement their own choice that the law of a specified jurisdiction apply to their agreement. Judicial respect for their choice advances the policy of protecting their expectations. This conflict of laws concept has come to be referred to as party autonomy. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 269-271 (1971) ["WEINTRAUB"]. However, the parties' freedom to choose what jurisdiction's law will apply to their agreement cannot be unlimited. They cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement. And they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply. So limited, party autonomy furthers the basic policy of contract law. With roots deep in two centuries of American jurisprudence, limited party autonomy has grown to be the modern rule in contracts conflict of laws. See SCOLES, *supra* at 632-652; WEINTRAUB, *supra* at 269-275; [RESTATEMENT \(SECOND\) OF CONFLICT OF LAWS](#) ["THE RESTATEMENT"] [§ 187](#) (1971).

The party autonomy rule has been recognized in this state. The Legislature **[**15]** has provided in the Uniform Commercial Code:

HN6 When a transaction bears a reasonable relation to this state and also to another state or

nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

[TEX.BUS. & COM.CODE ANN. § 1.105\(a\)](#)(Vernon Supp. 1989). In a different context, one court of appeals has elaborated further:

An express agreement of the parties that the contract is to be governed by the laws of a particular state will be given effect if the contract bears a reasonable relation to the chosen state and no countervailing public policy of the forum demands otherwise.

[First Commerce Realty Investors v. K-F Land Co., 617 S.W.2d 806, 808-09](#) (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.)(citing, *inter alia*, the [RESTATEMENT § 187](#)). We believe the rule is best formulated in [section 187 of the RESTATEMENT \[*24\]](#) and will therefore look to its provisions in our analysis of this case.

[Section 187](#) states: Law of the State Chosen by the Parties

(1) **HN7** The law of the state chosen by the parties to govern their contractual rights and duties will be applied if **[**16]** the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of Sec. 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677-78 (Tex. 1990), cert. denied, 498 U.S. 1048, 112 L. Ed. 2d 775, 111 S. Ct. 755 [**17] (1991). The initial issue before us with respect to the Al-Rushaid Appellees--whether and the manner in which the Al-Rushaid Appellees could compete with CARL--is one "which the parties could have resolved by an explicit provision in their agreement". See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comments c and d (1971). We therefore apply Section 187(1).

The contracts evincing the parties' choice of law conflict with each other. Four separate documents contain provisions that may operate as choice of law provisions. The first is the Kriol contract ⁴, the original of which is in Arabic ⁵ and was signed by a CPS representative and Al-Rushaid in his personal capacity. It begins "IN THE NAME OF GOD THE MERCIFUL," and recites that:

On this day 9/11/1398 Hegriya (which corresponds to 11/10/1978 A.D.)

...
....

The... parties have agreed to establish a limited liability company in accordance with the Act of the Minister of Industry Number 26 dated 17 Moharrem 1399 and in accordance with the Saudi Arabian Companies Act promulgated under Royal Decree No. M/6 dated 22/4/1385 Hegriya and the Foreign Capital Investment Code promulgated under Royal Decree No .35 dated [**18] 22/4/1383 Hegriya and the provisions set forth in these articles. . . .

....

ARTICLE SEVENTEEN - ARBITRATION AND SETTLEMENT OF DISPUTES

....

If arbitration fails to settle the dispute the ease will be taken to the committee of seting the [sic] commercial disputes at Dammam (Hayat Hasam El Menasaat El Tegariya). . . .

ARTICLE TWENTY - GENERAL RULES

- 1) The company shall abide by all the rules and regulations existing in force in the Kingdom of Saudi Arabia.
- 2) All provisions not stated in this contract will be governed by the code of the Companies Act.

The second relevant choice of law provision appears in CARL's bylaws, which were signed by a CPS representative and Al-Rushaid [**25] in his capacity as a representative of ARGTC, and reads in pertinent part:

In the Name of God
the Merciful, the Compassionate

... .

ARTICLE TWENTY-FOUR: DISPUTES

If any difference or dispute shall arise between the Parties as to the interpretation of [the bylaws] or any matter or thing arising therefrom or in connection therewith, then, upon either Parties [sic] giving notice of difference or dispute to the other, the same shall be referred [**19] to arbitration. . . [the venue for which] shall be the Committee for Settlement of Commercial Disputes, Dhahran, Saudi Arabia.

The third relevant choice of law provision appears in the Working Agreement. CPS and Creole were both parties to this document and were represented by the same person; ARGTC and CARL were both parties to the document and both represented by Al-Rushaid. It reads in pertinent part:

4. Each director of CARL will meet [the] responsibilities imposed [on him] by the laws of Saudi Arabia. Creole agrees to manage the joint venture company in accordance with Saudi Arabian laws. . . .

....

7. Any controversy or claim among the parties to this Agreement arising out of or relating to this Agreement shall be settled in accordance with the provision in the Bylaws of CARL for the settlement of disputes.

⁴ DARMCO and the Al-Rushaid Appellees refer to this document as CARL's Articles of Association. Although this is not self-evident, the document's appearance supports such a characterization.

⁵ Perhaps obviously, we work from certified English translations of the Arabic documents.

[**20] DARMCO and the Al-Rushaid Appellees rely on the foregoing provisions and claim they redundantly evince an agreement to subject to Saudi law all disputes arising from CARL's activities. Specifically, they argue that CARL's Articles of Association control the parties' relationship and preempt all other agreements because the Articles can be altered only by application to the Saudi Arabian Ministry of Trade. Appellants respond that mere agreements to "abide by" Saudi law are not binding choice of law clauses. In support of their argument, Appellants point to what they characterize as the only genuine choice of law provision in any of the contracts. It appears in the Technical Assistance Agreement, to which CPS and CARL were parties, with Al-Rushaid signing on CARL's behalf, and reads in pertinent part:

4.6 Applicable Law Any controversy, dispute or question arising out of, or in connection with, or in relation to this Agreement or its interpretation, performance, or nonperformance or any breach thereof shall be determined in accordance with the Laws of the United States of America.

Significantly, the foregoing clause is located in a section of the document that might [**21] properly be titled "Miscellaneous & Prudent" and appears between a force majeure clause and clauses concerning complete integration, assignability, and the extent to which the contract binds the parties successors.

Appellants' are correct in their assertions that no other clause in the relevant documents is as explicit or as broad as the foregoing. They are also correct in their assertion that no other provision even purports to preempt it. Indeed, we find persuasive Appellants' argument that it is the only traditional choice of law provision in any of the contracts, which argument is supported by the clause's location among other standardized contractual clauses such as force majeure and complete integration clauses, an attribute lacking in the provisions referring to Saudi Arabian law.

We find the argument equally persuasive even without reference to quantitative notions of the clauses usually or even prudently incorporated into a contract or of the conventional phrasing of a particular type of clause. We here find it useful to evaluate each clause's suitability for service as a model choice of law provision. We conceive of this issue as the extent to which each approximates the [**22] phrasing of a normatively optimal choice of law clause or, alternatively, as a

question of which clause would most likely result were the parties to draft a provision with the clear intention of producing the choice of law clause least vulnerable to attack. We find, for reasons we set out below, that both formulations point to the clause in the Technical Assistance Agreement that identifies United States law as controlling.

[**26] In reaching our conclusions, we find profitable a comparison of the language of each clause and an examination of its scope as evinced by its language, the document in which it appears, and the relationship between that document and the other documents. We begin with those clauses most easily dismissed as facially insufficient as choice of law clauses.

We think it unlikely that either Article 2 of the Kriol contract or Paragraph 4 of the Working Agreement were conceived and drafted as choice of law clauses. They speak more to the status of CARL than to the law applicable to all disputes involving it. They are essentially agreements not to operate an illegal enterprise. A promise to *abide* by Saudi law and *manage* CARL in accordance therewith is little more [**23] than a promise to refrain from criminal conduct. It addresses only the concern that a citizen of the United States would attempt to operate a business in a foreign locale without regard to the law of the locality. These clauses fail altogether to implicate what law will apply to disputes between the parties. Similarly, the pledge to meet one's legal responsibilities is not even a pledge not to be a criminal, but merely a pledge not to shirk a contractual undertaking. This, too, is unrelated to the parties' choice of law.

The remaining clauses, Article 24 of CARL's bylaws, Article 17 of the Kriol contract, and Paragraph 7 of the Working Agreement (collectively, the arbitration clauses) are slightly more difficult to overcome. These clauses at least address disputes or controversies among the parties. The broadest language in the arbitration clauses is Article 24's reference to "any matter or thing arising therefrom or in connection therewith...." One might seize on the nature and scope of the document in which this clause appears or on its ambiguous relationship to the other documents to argue the clause concerns only disputes arising from or connected with the bylaws. We think this [**24] restriction too facile, for it simply replaces the ambiguity regarding those disputes to which the clause applies with an ambiguity regarding those agreements to which the clause applies. Although the latter ambiguity is clearly the lesser evil, we find the

clause inconclusive. This does not, however, end our textual analysis.

Although the content of the arbitration clauses is inconclusive, much can be gleaned from what is lacking in them, especially when compared with the relative breadth of Paragraph 4.6 of the Technical Assistance Agreement. None of the arbitration clauses expressly applies to issues of interpretation, performance, nonperformance, or breach of the contract, which issues we think the gravamen of contractual disputes. Although Article 24 attempts to broaden its scope by invoking any matter connected with the bylaws, we find this generic attempt at universal relevance far less meaningful than Paragraph 4.6's methodical and deliberate expression of application to specific issues.

We end our textual analysis with an examination of the significance of the arbitration clauses' common theme: arbitration. Interestingly, no party cites a failure to submit this dispute to **[**25]** arbitration, and we cannot discern from the record whether arbitration was explored by the parties. This ambiguity notwithstanding, the arbitration clauses clearly contemplate arbitration as a prerequisite to litigation. Whether or not these clauses can colorably be characterized as choice of law clauses, they can certainly be deemed arbitration clauses. We here think it useful to return to our second formulation of the reasons we find the arbitration clauses inadequate, that being a question of the clause most likely to result from an overt, deliberate attempt to draft the clearest, least vulnerable choice of law clause. Given the arbitration clauses' common theme, we are then forced to question why the parties would bury a choice of law clause deep within an arbitration clause. We find an answer not in poor lawyering but in the intended purpose of the clauses. The arbitration clauses are precisely that, arbitration clauses. They are qualitatively different from the choice of law provision in the Technical Assistance Agreement. Although perhaps not the definitive choice of law clause, when compared to the arbitration clauses,

Paragraph 4.6 occupies an extreme position on a spectrum **[**26]** that represents the range of clarity and quality **[*27]** resulting from an effort to draft a model choice of law provision. One simply does not clutter an intended choice of law clause with sundry arbitration procedures ⁶. We conclude that Paragraph 4.6 of the Technical Assistance Agreement, which provides that United States law will apply, is the only choice of law provision in any of the relevant contracts.

Having found the operative choice of law clause among the contracts, we now determine its scope. The signatories to the Technical Assistance Agreement are two: **[**27]** Appellant CPS and CARL. Al-Rushaid signed the contract in his representative capacity as CARL's president. Al-Rushaid at once concedes that he signed the document and claims without elaboration that the record lacks evidence to establish that he actually knew of its existence. We find his argument transparent and therefore hold him accountable for knowledge of the contract's content and legal effect. The question remains whether the contract and its election for United States law encompass Al-Rushaid's various business interests involved in CARL and him personally.

At stake in the determination of the scope of the choice of law clause is the identity of those contract claims that will be governed by Texas law ⁷. This turns initially on those causes of action that are contractual ⁸, and secondarily on which contractual causes of action are subject to the choice of law clause. If construed in its narrowest sense, the choice of law clause in the Technical Assistance Agreement binds only CPS and CARL, the immediate parties to it. At its broadest, it binds both Appellants and the Al-Rushaid Appellees. In resolving this issue we find helpful an examination of the relationships among the **[**28]** relevant documents and the nature of each. We conceive of this issue as a question of whether the documents are more properly characterized as a primary contract with several

⁶ That one of the arbitration clauses provides a procedure for dispute resolution in the event arbitration fails does not alter our conclusion. First, one would expect to find such a provision in an arbitration clause, not in a choice of law clause. Second, we find this contention neutralized by the clauses' unexplained direction to what is apparently the same Saudi Arabian entity both for arbitration and for resolution in the event arbitration fails.

⁷ No party suggests that the choice of law clause's reference to United States law should implicate the law of any other American State.

⁸ Because Appellants bring contract claims against only the Al-Rushaid Appellees, the following discussion does not directly apply to DARMCO and the Dresser Appellees or to the tort claims against the Al-Rushaid Appellees. It applies only to Appellants' claims against the Al-Rushaid Appellees for breach of contract.

subsidiary contracts, what we term the hierarchical model, or as several contracts of initial organization that were executed in sequence out of logical necessity, what we term the sequential model. For the reasons set out below, we favor the latter characterization.

The five documents⁹ at issue serially (1) create a joint venture, (2) establish its bylaws, (3) identify ownership interests, **[**29]** (4) make provision for its initial capitalization, and (5) make provision for its staffing and other resource requirements. All functions are characteristic of the launching of a new enterprise. We think it conventional and nearly necessary to undertake an international business venture involving many parties by setting out in writing the nature of and rules for operating the venture, clarifying who will own it, and making clear how it will be funded and staffed. All are done at the outset of the business because all collectively provide the framework for its operation. Although each function is distinct, all are interrelated; although each function is performed in a separate writing, all are only facets of a single transaction and collectively comprise the very business into which the parties entered. The participants' ownership interests, for example, do not render unnecessary provision for the company's funding. They do, however, create expectations for individual contributions to the enterprise and are consequently wisely clarified before cash antes are sought. Similarly, although staff and technical resources might be secured **[*28]** without regard to the business' funding, they are prudently **[**30]** sought with an eye to the financial resources necessary to obtain them. A third example is the loan agreement's purpose to meet the initial capitalization requirements of Saudi Arabian law. This requirement could have been satisfied in the same instrument that created CARL. The parties chose, however, to use a separate writing. Indeed, the parties used five instruments to accomplish what might have been awkwardly done in a single omnibus agreement. That they did so does not segregate each contract from the others or from the larger transactional undertaking to launch an international joint venture. The parties simply elected to place the various agreements necessary to operate a new multi-participant business in separate, more digestible writings. Their unremarkable choice can no more confine the scope of

each contract than a dispute with the Saudi government over CARL's capitalization could be limited to the loan agreement, leaving unscathed CARL's existence as evinced by the Kriol contract.

[31]** The Al-Rushaid Appellees do not expressly challenge the foregoing analysis as it applies to any of them. In the single brief filed on behalf of all Al-Rushaid Appellees, they implicitly challenge only the applicability of the choice of law clause with respect to Al-Rushaid personally, arguing that he was not a party to the Technical Assistance Agreement. We have already resolved this issue against Al-Rushaid because of his failure to even allege that he represented the other Al-Rushaid Appellees in any kind of restricted capacity. Although in their brief they make little of this issue generally, the Al-Rushaid Appellees alternatively might be thought to attempt to characterize four of the contracts as subsidiary agreements of the Kriol contract. We find this characterization inappropriate. As we have discussed above, these contracts collectively comprise a single transaction. The Kriol contract is not so different in purpose or scope from the other contracts as to be subject to examination without reference to them. Neither is it more important than the others. While it might exhibit a temporal primacy over the other agreements, this is a necessary byproduct of the parties' decision **[**32]** to memorialize their agreement in separate writings and does nothing to establish a hierarchical relationship among the contracts. To the contrary, the temporal arrangement of the agreements supports a sequential model of the larger transaction. Before a company is funded, its owners should be known. Before ownership is established, it must be created. The five agreements embody only different, albeit perceptibly distinct, steps in the creation and organization of a sophisticated new business. The separate contracts reflect only the structure of the joint venture and its operational beginning. The creation and organization of the joint venture itself comprise a single legally significant event. Thus, we are presented with a single transactional event from which Appellants' contract claims arise. We therefore find the contract binding on all litigants that were parties to the five documents we have discussed¹⁰. Accordingly, we enforce the parties' choice to subject their disputes to

⁹ The Kriol contract, CARL's bylaws, the Working Agreement, the Loan Agreement, and the Technical Assistance Agreement.

¹⁰ We find all Al-Rushaid Appellees encompassed by the choice of law clause because of Al-Rushaid's failure to even attempt to clarify his relationships with his business interests. Appellants allege each is Al-Rushaid's alter ego, and he directs us to no record evidence that controverts this allegation.

United States law, and, consistent with [Section 187\(1\) of the RESTATEMENT](#), find Appellants' contract claims governed by United States law. Appellants' third point of error is sustained with respect to **[**33]** the contract claims they assert against the Al-Rushaid Appellees.

C. Tort Claims

Appellants brought several tort claims against Appellees. Appellants asserted claims for tortious interference against DARMCO and the Dresser Appellees, civil conspiracy claims against those parties and the Al-Rushaid Appellees, and misappropriation of trade secrets and breach of fiduciary duty claims against the Al-Rushaid Appellees. The Texas Supreme Court has identified the choice of law principles applicable to tort claims, stating that

It is the holding of this court that in the future **HN8** all conflicts cases sounding in tort **[*29]** will be governed by the "most significant relationship" test as enunciated in [Sections **\[**34\]** 6](#) ¹¹ **[**35]** and [145](#) ¹² [of the RESTATEMENT \(SECOND\) OF CONFLICTS](#) [OF LAWS]. This methodology offers a rational yet flexible approach to conflicts problems. It offers the courts some guidelines without being too vague or too restrictive. It represents a collection of the best thinking on this subject....

[Gutierrez v. Collins, 583 S.W.2d 312, 318 \(Tex. 1979\)](#)(footnotes added). We therefore apply [Section 145](#) to the facts of the instant case. Before we begin our [Section 145](#) analysis, however, we turn to Section 156 of the RESTATEMENT for guidance as to the relative importance of the four factors identified in [Section 145](#). Section 156 reads:

¹¹ the [Section 6](#) sets out general principles by which the more specific rules are to be applied, and states in full:

Choice-of-Law Principles

(1) **HN9** A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

¹² Section 145 lists factual matters to be considered when applying the principles of Section 6 to a tort case, and states in full:

The General Principle

(1) **HN10** The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Tortious Character of Conduct

(1) The law selected by application of the rule of [§ 145](#) determines whether the actor's conduct was tortious.

(2) **The applicable law will usually be the local law of the state where the injury occurred.**

RESTATEMENT § 156 (emphasis added). Thus, the RESTATEMENT reveals an emphasis on the situs of the injury, at least with respect to the application of [Section 145](#). Accordingly, it is to this factor that we first turn.

The injury occurred in Saudi Arabia. Appellants themselves appear to recognize this when they allege that the Dresser **[**36]** Appellees acted to "wrest[] field servicing business in Saudi Arabia" away from CARL and Appellants and that the Dresser Appellees and Al-Rushaid "have attempted to keep [Appellants] from doing any further business in Saudi Arabia." Although Appellants now argue they were harmed financially in Texas, that financial harm is a mere measurement of and was produced by Appellants' inability to operate in Saudi Arabia. The record lacks any evidence that any party acted to hinder Appellants' ability to operate outside of Saudi Arabia or that Appellants' competitiveness in the United States suffered. Indeed, the trial judge in the previous federal anti-trust litigation correctly found that any anticompetitive effects were felt in Saudi Arabia. [Section 145](#)'s first element favors Saudi Arabia.

The second element we consider under [Section 145](#) is the situs of the injury-producing conduct. The parties here engage in a discourse largely duplicative of their argument about the situs of the injury. Not surprisingly, we reach the same conclusion and again find Appellants' pleadings revealing. Appellants allege that the Dresser Appellees "spread false and malicious statements to [Appellants] **[**37]** and CARL's customers" and that "Dresser used its dominant market power to ... entice Al-Rushaid into **[*30]** agreeing not to do any further business with [Appellants]." Appellants now argue for the application of Texas law because the conduct they allege to be tortious was directed from Texas. First, we find this argument to be inapplicable to the Al-Rushaid Appellees, a Saudi Arabian citizen and his affiliated Saudi Arabian business interests. Appellants do not allege that the Al-Rushaid Appellees engaged in any relevant conduct **outside** of Saudi Arabia. Second, that tortious conduct may have been directed from Texas

does not alter the reality that the conduct was directed to and carried out in Saudi Arabia, and it was the carrying out of the conduct that was the source of its harmful nature. [Section 145](#)'s second element favors Saudi Arabia.

The third [Section 145](#) element we consider is the parties' domiciles and residences. The present litigation involves nine litigants domiciled in four countries and as many continents, with residences in Saudi Arabia, Liechtenstein, Houston, Dallas, and New York. Of nine litigants, none is a Texas corporation and only two have offices in Texas. **[**38]** Significantly, although Appellant Creole and Appellee Dresser Industries are headquartered in Texas, neither was a direct signatory to any of the documents creating and controlling CARL or DARMCO. The signatories to CARL's seminal agreement were Appellant CPS, a Panamanian Corporation with no Texas office, and Al-Rushaid; the participants in DARMCO were Appellant Dresser A.G. (Vaduz) and an Al-Rushaid entity. Appellants here offer only the weak argument that Creole was involved in the transactions because it provided various resources to CPS. Creole, however, was not a party to CARL. CPS was. It is undisputed that CPS is a Panamanian corporation with no offices in Texas. The trial judge had a firm grasp on this issue.

It strikes me as if you have an offshore corporation and CPS was created for the purpose of having the benefits of an offshore corporation to carry out business without reference to the laws of the United States. . . . And if you live by a foreign corporation, you die by a foreign corporation. . . . You had this offshore business for a particular reason to achieve the benefits of having an offshore corporation and also carry out some liability that comes along **[**39]** with this kind of way of doing business. You have to accept the risk of those liabilities along with accepting the benefits that you get from that kind of business.

So, it strikes me that we have here a Panamanian corporation entering into a deal with a Saudi national under the laws of Saudi Arabia to carry the business that Saudi Arabia -- and I don't see any way that I can rule but that Saudi Arabian law applies.

Because five of the nine litigants are Saudi Arabian, [Section 145](#)'s third element favors Saudi Arabia slightly.

The foregoing analysis of the first three of [Section 145](#)'s four elements does much to foretell the outcome of the

analysis of the fourth element. Indeed, we think it rare that the injury, the conduct producing it, and the parties' domiciles would point to the same foreign state, yet the relationship would somehow be centered in Texas. Although we do not trivialize [Section 145](#)'s fourth element, we find it potentially duplicative of an analysis of the first three, which finding is supported by the recognition, present in the language of Section 145(2)(d) itself, that analysis of an extant relationship will only be intermittently possible. We nonetheless **[**40]** find two relationships worthy of discussion.

The first is the relationship between Appellants and the Dresser Appellees, which we think most properly characterized as a competitive one. These parties competed in the Saudi Arabian market to provide energy equipment maintenance and repair services. We find Saudi Arabia to be the center of gravity of this competitive relationship. Cf. [DeSantis, 793 S.W.2d at 680-81](#) (finding that Florida has no interest in restraints on competition in Texas). The second relevant relationship existed between Appellants and the Al-Rushaid Appellees. While we could chronicle Appellants' contacts with each of the Al-Rushaid entities, we think these relationships more efficiently examined by focusing on the contacts between Appellants and Al-Rushaid, in part because Al-Rushaid's testimony does not clearly define his relationships **[*31]** with his business interests and because he was obviously the driving force behind all of them. Appellant CPS and Al-Rushaid were joint venturers in an enterprise that was designed to and actually did operate exclusively in Saudi Arabia. Thus, their relationship was centered in Saudi Arabia. Cf. [Maxus Exploration Co. v. Moran](#) **[**41]** [Bros., Inc., 817 S.W.2d 50 \(Tex. 1991\)](#) (applying Kansas, not Texas, law to a contract for drilling services to be performed in Kansas notwithstanding that contract was negotiated in and contracting parties were headquartered in Texas). [Section 145](#)'s fourth element favors Saudi Arabia.

Mindful that a proper [Section 145](#) analysis is much more than a bean-counting exercise, we find that both the quantity and quality of the contacts among the parties and Saudi Arabia mandate the application of Saudi Arabian law to all tort claims asserted by Appellants because the parties and the subject matter

of this litigation have a more significant relationship to Saudi Arabia than to Texas. Accordingly, we overrule Appellants' points of error to the extent they challenge the applicability of Saudi Arabian law to Appellants' tort claims. Having found Saudi law applicable, it remains to determine the outcome of these claims under Saudi law.

The trial court found that Saudi law did not recognize Appellants' tort claims. Appellants claim that extensive expert testimony conflicted over the extent to which Saudi law provided causes of action similar to Anglo-American tort claims. We find any factual conflict **[**42]** in the expert testimony insufficient to preclude summary judgment.

The parties agree that Saudi Arabia generally provides remedies for wrongs. They further agree that Saudi law employs different nomenclature than Texas law for certain causes of action in what is known to Texas law as tort. They agree that Saudi Arabian law offers no cause of action termed tortious interference with contractual relations, civil conspiracy, or breach of fiduciary duty. Appellants claim, however, that conduct that is actionable in Texas as one or more of the foregoing torts is actionable in Saudi Arabia, though it may be known by another name. They rely heavily on the agreed upon notion that Saudi law provides redress for wrongs. This, however, begs the question, for it fails to delineate what is wrong or to identify the form of relief available for any given wrong. Appellants claim the evidence at least presents a fact question sufficient to preclude summary judgment. A careful review of the evidence leads us to conclude otherwise.

1. Tortious Interference

The expert testimony produced by the parties is in greatest agreement with regard to whether Saudi Arabian law recognizes claims for tortious interference. **[**43]** The following is the strongest testimony provided by Appellants' expert, William Van Orden Gnichtel ¹³:

Q. Would Saudi law allow a claim to redress a wrong against a party for interfering with a contract that Plaintiff might have had?

A. Yes.

¹³ As a preliminary matter, Appellees challenge the admissibility of Gnichtel's testimony, claiming it is hearsay because Gnichtel conceded that many of his opinions and much of his knowledge of Saudi law resulted from conversations with a colleague who, unlike Gnichtel, is a licensed Saudi Arabian lawyer. We find it unnecessary to resolve this allegation because of our conclusions about the results of Appellants' tort claims under Saudi law.

Q. ... Is it your testimony that type of cause of action would exist but the label tort may not be known in Saudi Arabia?

A Yes, I would set aside or disregard the nomenclature and get to the essence, and the essence is basically that if one does a wrong to another he will be required to compensate the wronged party.

Although Gnichtel's first response might preclude summary judgment if considered alone, his second response is fatal. It is death by qualification. It reveals that Gnichtel relied on a general principle without regard to the specific conduct at issue in the instant case and without regard to the particular cause of action known to Texas law as tortious interference with contractual relations.

[**44] The Dresser Appellees' expert, Joseph Saba, was more precise about the content of Saudi law and carefully exposed the modesty [*32] of Gnichtel's statements. In an affidavit available to the trial court for summary judgment, Saba stated:

The American concept of tortious interference with contracts is not among the acts giving rise to a cause of action in Saudi Arabia. The nonexistence of such a cause of action is consistent, inter alia, with the Hanbali School's emphasis on individual free will and responsibility. If a person does not perform his contractual obligations or does not enter into a contract or breaches his duties to another, such conduct is his own responsibility, not that of anyone else. Even if another person persuades, requests or otherwise influences such conduct, that other person is not liable in a civil action for monetary payments to the plaintiff, in the absence of a direct contractual obligation running from that other person to the plaintiff.

Saba went on to address a specific statement from Gnichtel's affidavit, in which Gnichtel foreshadowed his live testimony we quoted above, saying, "The Shari'a [Islamic scripture] recognizes civil liability [**45] for wrongful acts resulting in damages. This is an overriding principle of the Shari'a. It is not dependent on specific contractual arrangements or specific regulations promulgated by the government." Saba responded:

This passage is literally correct, so long as it is read to involve concepts of Saudi Arabian law rather

than more general American usages. Thus, there is liability for "wrongful acts," but only for those acts that are recognized as wrongful under Saudi Arabia's application of the Shari'a or under the Regulations [of the Kingdom of Saudi Arabia]. The Saudi scope of liability of one private party to another does not encompass all acts which American law might consider to be wrongful.... Finally, while the existence of liability is not necessarily dependent upon "specific contractual arrangements or specific regulations," the conduct in question still must lie within an appropriate category of actionable conduct under Saudi Arabia's strict construction of the Shari'a. As stated above, based upon my review of the pleadings in this case, the claims against Dresser in this suit do not fit within such a category. There is no nexus under Saudi law between Dresser and [**46] the plaintiffs giving the plaintiffs the cause of action they assert.

Thus, Saba exposed the hollowness of Gnichtel's conclusions by defining the terms Gnichtel used and then applying the definitions to Gnichtel's statements to reveal their precise content. He made clear the inadequacy of Gnichtel's reliance on a general principle of justice by showing the principle to itself be dependent on Saudi law's definition of terms used to articulate the principle. Further, he specifically examined the viability of Appellants' particular causes of action for tortious interference and expressed his opinion that they were not viable. Significantly, Appellants did not respond to Saba's deconstruction of Gnichtel's statements and in their brief offer no argument to overcome his conclusions. Indeed, on cross-examination Gnichtel conceded that Saudi law would not recognize a claim for contractual interference against a non-contracting third party and acknowledged that his statements stopped short of saying that Dresser could be liable to Appellants for interfering with Appellants' contracts with Al-Rushaid. Absent even argument that Saba's testimony is inaccurate, the trial court was justified [**47] in finding there existed no genuine issue of material fact and in applying Saudi Arabian law to Appellants' claims against the Dresser Appellees for tortious interference with contractual relations, which application resulted in their dismissal. Accordingly, we overrule Appellants' first and second points of error to the extent they challenge the outcome of Appellants' tortious interference claims under Saudi Arabian law.

2. Breach of Fiduciary Duty

Appellants brought claims for breach of fiduciary duty against the Al-Rushaid Appellees. The parties agree

that Saudi Arabian law recognizes the concept of fiduciary duty and provides a cause of action for the breach thereof. Appellants claim that the trial court erred by granting summary judgment in favor of the Al-Rushaid Appellees based on the Al-Rushaid Appellees' contention that Saudi law allows lawsuits among parties to a business enterprise over matters arising from the [*33] company's activities only during the existence of the company. The Al-Rushaid Appellees offered testimony to this effect, their expert specifically stating that all claims not settled prior to dissolution are waived. Appellants in their brief do not challenge that [**48] Saudi law requires claims to be asserted prior to dissolution. Neither do they claim they asserted their breach of fiduciary duty claims in this lawsuit before CARL was dissolved or that these claims do not involve CARL. Appellants address only the Al-Rushaid Appellees' secondary argument that Appellants' breach of fiduciary duty claims are barred by *res judicata* and estoppel. Absent argument that Saudi law allows parties to a business enterprise to bring against each other claims involving the business after its dissolution, and absent competent evidence to establish that Saudi law follows a different rule, the trial court was justified in dismissing Appellants' claims for breach of fiduciary duty. Accordingly, we overrule Appellants' third point of error to the extent it challenges the outcome of Appellants' breach of fiduciary duty claims under Saudi Arabian law.

3. Misappropriation of Trade Secrets

Appellants brought claims for misappropriation of trade secrets against the Al-Rushaid Appellees. Appellants' brief mystifyingly omits any argument that the trial court erred in dismissing these claims. We presume Appellants rely on their general contention, which we addressed in our [**49] discussion of Appellants' tortious interference claims, that Saudi Arabian law provides redress for wrongs. If our presumption is correct, we do not disturb the trial court's judgment on this issue for the reasons we cited in our discussion of Appellants' tortious interference claims. If our presumption is incorrect, we do not disturb the trial court's judgment because of Appellants' failure to brief this aspect of their point of error directed to the Al-Rushaid Appellees, which failure offends [Texas Rules of Appellate Procedure 74\(f\)](#). We therefore overrule Appellants' third point of error to the extent it challenges the outcome of Appellants' claim for misappropriation of trade secrets under Saudi Arabian law.

4. Conspiracy

Appellants brought civil conspiracy claims against all Appellees. Aside from a reference to Appellees' contentions that Saudi law does not recognize claims for civil conspiracy, Appellants offer no argument on this issue and do not even allege that such claims are viable under Saudi law. They make no attempt to challenge expert Saba's opinion that:

The law of Saudi Arabia does not provide a private party with a cause of action or other remedy against a third [**50] party for conspiring to perform an act, whether that act is itself a compensable wrong or not. Depending upon the nature of the act, the person who commits the act may or may not be liable to his victim. In any event, however, another person is not liable for conspiring with the actor.

Given that Appellants direct us to no record evidence to controvert the notion that Saudi law provides no cause of action for conspiracy independent of the underlying conduct and, alternatively, our conclusion that Appellants' other tort claims are not viable under Saudi Arabian law, the trial court was justified in dismissing Appellants' claims for civil conspiracy. Accordingly, we overrule all of Appellants' points of error to the extent they challenge the outcome of Appellants' civil conspiracy claims under Saudi Arabian law.

D. Public Policy

Appellants alternatively urge that none of their claims should be governed by Saudi Arabian law because their claims involve rights the vindication of which implicates the fundamental public policy of Texas. Appellants rely on Sections 6(2)(b) and 6(2)(c) of the RESTATEMENT and on [DeSantis, 793 S.W.2d 670](#), in which case the Texas Supreme Court found [**51] that enforcement of a noncompetition agreement that constituted an unreasonable restraint on work performed in Texas implicated the fundamental public policy of the State. *DeSantis* involved a contract claim governed by [Section 187\(2\) of the RESTATEMENT](#), which is particularly deferential to the public policy of a state with a materially greater interest than the state [**34] selected by the parties in the determination of the issue. That *DeSantis* involved a contract claim renders it irrelevant to Appellants' tort claims. Moreover, we resolved Appellants' contract claims under [Section 187\(1\) of the RESTATEMENT](#), which does not expressly consider the public policy of the chosen state. Thus, we found Appellants' contract claims controlled by Texas law because the parties' contractually agreed to subject

disputes to United States law, not because the public policy of the State of Texas favored the application of its law.

Sections 6(2)(b) and 6(2)(c) of the RESTATEMENT do not alter our conclusion that Appellants' tort claims are governed by Saudi Arabian law. These sections direct courts to consider the policies of the forum. Whether or not Texas has an important policy interest in policing **[**52]** the conduct of subsidiaries of businesses with Texas offices that occurs outside Texas and has no effect on its territory, this is only one of several factors listed in Section 6. Further, [Section 145 of the RESTATEMENT](#) directs us to consider Section 6 factors in light of the specific contacts listed in [Section 145](#). Appellants labor under a heavy burden when they allege error in a failure to consider two of seven factors, which seven factors are to be applied in light of four other factors, which in turn are subject to varying applications depending on their relative importance to a particular issue. In a discussion of the fundamental state policy exception to the general rule of [Section 187\(2\)](#), which we emphasize is irrelevant, the Texas Supreme Court indicated the exception's narrow scope.

[Comment g to section 187](#) does suggest that application of the law of another state is not contrary to the fundamental policy of the forum merely because it leads to a different result than would obtain under the forum's law. We agree that the result in one case cannot determine whether the issue is a matter of fundamental state policy for purposes of resolving a conflict of laws. **Moreover, **[**53]** the fact that the law of another state is materially different from the law of this state does not itself establish that application of the other state's law would offend the fundamental policy of Texas.** In analyzing whether fundamental policy is offended under [section 187\(2\)\(b\)](#), the focus is on whether the law in question is a part of state policy so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law, despite the parties' original intentions, and even though the agreement would be enforceable in another state connected with the transaction.

[DeSantis, 793 S.W.2d at 680](#) (emphasis added). We

think this indication of the narrowness of the fundamental policy exception in [Section 187\(2\)](#) applicable to tort claims examined under [Section 145](#) to the extent [Section 145](#) directs courts to consider the policies of the forum and other interested states as directed by Section 6. We therefore approach Sections 6(2)(b) and 6(2)(c) with the presumption that they will rarely be dispositive.

There is no evidence to suggest the trial court failed to consider or attributed too little weight to the public policy of Texas. We have examined the **[**54]** relationships among the parties, Texas, Saudi Arabia, and the subject matter of this litigation pursuant to the RESTATEMENT and concluded that the parties and this litigation have the most significant relationship to Saudi Arabia. Interestingly, the Texas Supreme Court's adherence to the RESTATEMENT leads us to further conclude that the RESTATEMENT'S most significant relationship test itself is woven into the fabric of Texas policy. Thus, even if Texas had a significant policy interest in giving extraterritorial effect to its own laws, it would be countered by Texas' interest in having the tort claims in this litigation governed by the state with the most significant relationship to the claims and parties. We therefore overrule all of Appellants' points of error to the extent they challenge the trial court's judgment based on the fundamental policy of the State of Texas.

III. CONCLUSION

Having overruled Appellants' first and second points of error with respect to all claims, having overruled Appellants' third point of error with respect to tort claims, and having sustained Appellants' first point of error with **[*35]** respect to contract claims asserted against the Al-Rushaid Appellees, **[**55]** we affirm the judgment of the trial court dismissing all of Appellants' claims against DARMCO and the Dresser Appellees and their tort claims against the Al-Rushaid Appellees, and reverse the judgment of the trial court dismissing the contract claims against the Al-Rushaid Appellees. We hold Appellants' contract claims against the Al-Rushaid Appellees governed by ¹⁴ Texas law and remand the case for trial of these claims

[56]** May 4, 1995

¹⁴ In what they denominate a conditional cross-point of error, the Al-Rushaid Appellees purport to challenge the trial court's alleged implicit overruling of their Plea In Abatement, which they filed simultaneously with their Motion For Summary Judgment, and urged as an alternative ground for disposition of the case. Their Plea In Abatement sought abatement based on comity and forum non conveniens. That the trial court never ruled on the plea is fatal to their claim that it was implicitly overruled when the trial court granted their Motion For Summary Judgment. The Al-Rushaid Appellees cite no authority to support their apparent

/s/ RICHARD BARAJAS,

Barajas, C.J., Larsen and McCollum, JJ.

Chief Justice

(McCollum, J., not participating)

Before Panel No. 3

contention that comity and forum non conveniens are necessarily prerequisite issues to a conflict of laws issue. Because the trial court has not ruled on the Al-Rushaid Appellees' Plea In Abatement, there exists no order or judgment from which they can appeal. We therefore do not address the issue, and our opinion does not prevent the Al-Rushaid Appellees from urging their plea on remand.

Nathaniel Morales

Problems and Process

INTERNATIONAL LAW AND
HOW WE USE IT

ROSALYN HIGGINS

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1994

that individuals *can* be the beneficiaries of international law rights which fall upon states to perform as a matter of general international law.

What exactly do we mean when we ask if international law *applies* to individuals? Do we mean, are they obliged to follow its precepts? Or do we mean can they *invoke* it as the required standard of behaviour in other actors, such as states? These are difficult questions, and we will need to approach the underlying issues step by step.

The increasing importance of international arbitration is an area that we should perhaps be watching in this area. It is now commonplace for a foreign private corporation and a state who have entered into contractual relations to agree to international arbitration in the event of a dispute. (And, in principle, the private party could be an *individual*, though as such he will probably have less leverage than a foreign corporation and may well have to accept the local legal system rather than reference to international arbitration.) The applicable law clause may designate a national legal system, but more usually it will refer to 'general principles of law' or 'the law of country X and the relevant principles of general international law', or some such similar formula. At one bound, therefore, the private party has escaped the need to have his claim brought by his national government, and can invoke international law. Thus, if State X and Mr Y have a contract, State X's ability to vary the terms of that contract will be interpreted by reference to the relevant principles of international law; and compensation due to Mr Y will likewise be appraised by reference to international law. Thus, even if the purists wish to say that State X owes Mr Y no international law obligations about his property (owing them only to Mr Y's national state), the reality is that Mr Y *can* invoke such legal norms and it is as if international law obligations were owed by the state to the individual. Arbitral clauses which refer to international law as the applicable law effectively remove the alleged inability of individuals to be the bearer of rights under international law. This is being done by mutual consent, of course—but the point is that there is *no inherent reason* why the individual should not be able directly to invoke international law and to be the beneficiary of international law.

Developments in this area, as elsewhere in international law, occur as much through the force of circumstances as through any conscious intellectual processes. The arrangements for the litigation of issues arising out of the Iran revolution is an interesting case in point. The Agreements with Iran that resulted in the release of the US hostages included provision that a Claims Tribunal should be set up in The Hague. This Tribunal was

⁴² Art. V, Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (1981) 20 *ILM* 230.

en bloc (for example, by the Mixed Arbitral Tribunals set up after the First World War and the United States-Iranian Tribunals under the Agreement of January 19, 1981). The awards to be examined here have an international character inasmuch as one of the parties to the original relationship is a State and the other a national of another, that the subject matter is not confined to the boundaries of one country only and that therefore the arbitration proceedings are intended to be international rather than national.

On the other hand, the concession agreements, which are directly in issue and not only incidentally, have close links with municipal law and envisage rights under a specific system of municipal law. Moreover, however international the composition and the remit of the tribunal, its seat is local within the jurisdiction of some State and subject to it, leaving aside questions of State immunity (to be discussed below). Owing to this discordant note, agreements of this kind are said to have become "delocalised"³ or "internationalised,"⁴ and to be no longer subject to one system of laws.⁵ In the words of Dupuy, arbitrator in the *Texaco* case:

"Contractual practice tends more and more to "delocalise" the contract or . . . to sever its automatic connections to some municipal law, and particularly the municipal laws of a contracting State, so much so that today when the municipal law of the contending State governs the contract, it is by virtue of the agreement between the parties and no longer by a privileged and, so to say, mechanical application of the municipal law."

The notion of delocalisation or internationalisation has been employed to convey, on the one hand, that an arbitral tribunal, in reaching its decision, may rely on international law either exclusively or in conjunction with municipal law and, on the other hand, that a combination of municipal systems of law may take the place of a single system of laws. It has also been interpreted in the sense that in order to ascertain the municipal system of

³ *Texaco v. Libyan Arab Republic* (1977) 53 Int.L.R. 393, 443 (hereinafter referred to as *Texaco*); *Revere Copper & Brass Inc. v. Overseas Private Investment Corp.* (1978) 56 Int.L.R. 258, 274-275, 278 (hereinafter referred to as *Revere*); J. Paulsson, "Arbitration Unbound: Award Detached From the Law of its Country of Origin", 30 I.C.L.Q. (1981), p. 358, at p. 362; F. Rigaux, "Des dieux et des héros," 67 *Revue critique de droit international privé* (1978), p. 435.

⁴ *Texaco* 458; *Government of Kuwait v. American Independent Oil Co.* (1984) 66 Int.L.R. 518, 560 (hereinafter referred to as *Aminoil*); *S.P.P. (Middle East) Ltd. et al. v. Arab Republic of Egypt*, 22 I.L.M. (1983), p. 752, at p. 769 (para. 49) (hereinafter referred to as *EGOTH*); for some comments, positive and negative, see F. A. Mann, *Studies in International Law* (1973), pp. 222 *et seq.*, and 262 *et seq.*; F. Rigaux, *Droit public et droit privé dans les relations internationales* (1977), p. 376 *et seq.*, especially at p. 400; J. D. M. Lew, *Applicable Law in International Commercial Arbitrations* (1978), s.100, p. 82; J. Fouchard, *L'arbitrage commercial international* (1965), ss.35, 362, 465; Fatouros, *loc. cit.* in note 2 above at pp. 135-137; F. Rigaux, *loc. cit.* in note 3 above, at p. 446; Redfern, *loc. cit.* in note 1 above, at pp. 77-87.

⁵ B.P. 327; *Texaco* 455; *Revere* 466-667; *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.* (1963) 35 Int.L.R. 136, 172 (hereinafter referred to as *Sapphire*).

laws which must determine the contractual rights and obligations of the parties, the tribunal must rely, as a framework⁶ or basis, on principles of choice of law which are to be found by the tribunal either in its own notions of law⁷ or in public international law,⁸ which may perhaps rely on the general principles of private international law.⁹

Alternatively, without a firm framework or legal foundation, a combination of legal systems, including substantive international law¹⁰ is to determine the substance of a dispute. No specific principles, rules or criteria for selecting the laws to form this combination have been established, however; instead the will of the parties as expressed in their agreement has furnished the ultimate justification.¹¹ The oil concessions granted by Libya and by other Arab States provided a standard clause (clause 28) to this effect.

“The Concession is governed and interpreted in accordance with the principles of law of Libya [Kuwait] common to the principles of International Law and in the absence of such common principles by and in accordance with the general principles of law including such of these principles as may have been applied by international tribunals.”

Free choice of law as a rule of international conflict of laws, part of public international law, has, of course, long been admitted by international tribunals set up between States,¹² and by international instruments.¹³ On its own in arbitration proceedings between a State and an alien, not derived

⁶ The term “selector clause,” employed by D. Suratgar, “The Sapphire Arbitration Award,” 3 *Columbia Journal of Transnational Law* (1965), p. 152, at pp. 176, 185, may perhaps convey the same meaning.

⁷ *Aramco* 166; *Aminoil* 560; distinguish the *Diverted Cargoes* case, *Greece v. United Kingdom* (1955) Int.L.R. 820, 824; 46 *Revue critique de droit international privé* (1957), p. 278, at p. 289: a contract between States was in issue; see J. L. Simpson, “The Diverted Cargoes Arbitration,” 5 *I.C.L.Q.* (1956), p. 471, at p. 482; J. Dach, “Money Reference and Conversion of Foreign Money” 5 *American Journal of Comparative Law* (1956), p. 512, at p. 515; J. L. Simpson and H. Fox, *International Arbitration* (1959), p. 135; P.-Y. Tschanz, “The Contribution of the Aminoil Award to the Law of State Contracts,” 18 *International Lawyer* (1984) p. 245, at p. 260.

⁸ *Texaco* 450; *Libyan Oil v. Government of the Libyan Republic* (1977) 62 Int.L.R. 140, 172 *et seq.* (hereinafter referred to as *Liamco*); *Revere* 272, applying the *Serbian and Brazilian Loans* cases, P.C.I.J., Series A, Nos. 20 and 21 “much refined”; also *Aramco* 165; F. R. Tesón, “State Contracts and Oil Expropriations: The Aminoil Arbitration,” 24 *Virginia Journal of International Law* (1984), p. 323, at p. 328, but see Tschanz, *loc. cit.* in note 7 above, at p. 263.

⁹ *Aramco* 157.

¹⁰ *Sapphire* 173 (interpretation); *Revere* 294; Croff, *loc. cit.* in note 1 above, at p. 615.

¹¹ *Sapphire* 174; *B.P.* 302; *Texaco* 404; *Liamco* 172; *Aminoil* 560 (6).

¹² Lipstein, *loc. cit.* in note 1 above; H. Batiffol, “L’arbitrage et les conflits de loi,” *Revue de l’arbitrage* (1957), p. 111; Ch. Carabiber, *L’arbitrage international de droit privé* (1960), pp. 50, 92; Croff, *loc. cit.* in note 1 above, at p. 616.

¹³ European Convention on International Commercial Arbitration of April 21, 1961, Art. VII(1), 484 U.N.T.S. 364; Convention on the Settlement of Investment Disputes between States and Nationals of other States of March 18, 1965 (hereinafter referred to as ICSID Convention), 575 U.N.T.S. 159, Art. 42(1).



Questioned

As of: October 12, 2015 11:21 AM EDT

[Order of United Commercial Travelers v. Wolfe](#)

Supreme Court of the United StatesFebruary 28, 1946, Argued ; June 9, **1947**, Decided

No. 32

Reporter

331 U.S. 586; 67 S. Ct. 1355; 91 L. Ed. 1687; 1947 U.S. LEXIS 2161; 36 Ohio Op. 129; 173 A.L.R. 1107

ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA v. WOLFE

[Clause of the U.S. Constitution](#) required South Dakota to enforce petitioner's constitutional provision precluding such suit.

Subsequent History: Reargued November 12, 1946.

Prior History: CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA.

In an action brought in a state court in South Dakota, an Ohio citizen obtained a judgment against a fraternal benefit society incorporated in Ohio for benefits claimed to have arisen under the society's constitution as a result of the death of an insured member who was a citizen of South Dakota. The Supreme Court of South Dakota affirmed. [70 S. D. 452, 18 N. W. 2d 755](#). This Court granted certiorari. [326 U.S. 712](#). Reversed, p. 625.

Disposition: [70 S. D. 452, 18 N. W. 2d 755](#), reversed.

Core Terms

membership, fraternal, full faith and credit clause, benefits, certificate, societies, by-laws, mutual, full faith and credit, doing business, state law, contracts, charter, limitations, statute of limitations, incorporation, courts, cases, decedent, license, terms, obligations, provisions, companies, statutes, corporations, beneficiary, decisions, public act, Subordinate

Case Summary

Procedural Posture

Petitioner, a fraternal benefits society incorporated in Ohio, sought review of judgment from the Supreme Court of South Dakota in respondent's suit to recover benefits resulting from the death of an insured member who had been a citizen of South Dakota throughout his membership, contending that the [Full Faith and Credit](#)

Overview

Petitioner sought review of judgment in respondent's suit to recover benefits resulting from the death of an insured member who had been a citizen of South Dakota throughout his membership. Petitioner contended that the [Full Faith and Credit Clause of the U.S. Constitution](#) required South Dakota courts to give effect to a provision of petitioner's constitution prohibiting actions commenced more than six months after disallowance of a claim when such provision conflicted with South Dakota law. On appeal, judgment was reversed. In support of its ruling, the **U.S.** Supreme Court held that South Dakota was required by the **U.S.** Constitution to give full faith and credit to petitioner's constitutional provision barring suit. It was the essence of the [Full Faith and Credit Clause](#) that if a state gave some faith and credit to the public acts of another state by permitting its own citizens to become members of, and benefit from, fraternal benefit societies organized by another state, then it must give full faith and credit to those public acts and must recognize the burdens and limitations inherent in such memberships.

Outcome

Judgment was reversed as it was the essence of the [Full Faith and Credit Clause](#) that if a state gave some faith and credit to the public acts of another state by permitting its own citizens to become members of, and benefit from, fraternal benefit societies organized by another state, then it must give full faith and credit to those public acts and must recognize the burdens and limitations inherent in such memberships.

LexisNexis® Headnotes

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Borrowing Statutes

Constitutional Law > Relations Among Governments > Full Faith & Credit

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Types of Statutes

HN1 Statutes frequently provide that an action may not be maintained if it has been barred by the statute of limitations at the place where the action accrued or, in some cases, at the domicile of the defendant. These numerous "borrowing statutes" demonstrate the general recognition of the sound public policy of limiting, under some circumstances, the application of the general statute of limitations of the state of the forum. The [Full Faith and Credit Clause](#) applied, as in the present case, is but another limitation voluntarily imposed, by the people of the **United** States, upon the sovereignty of their respective states in applying the law of the forum.

Constitutional Law > Substantive Due Process > Scope

Contracts Law > Contract Conditions & Provisions > General Overview

Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN2 In the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period. Such shorter periods, written into private contracts, also have been held to be entitled to the constitutional protection of the [Fourteenth Amendment](#) under appropriate circumstances.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Constitutional Law > Relations Among Governments > General Overview

Constitutional Law > Relations Among Governments > Full Faith & Credit

Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN3 Fraternal benefit societies exist by virtue of state legislation, and the rights and obligations incident to membership therein are as much entitled to full faith and credit as the statutes upon which they depend.

Constitutional Law > Relations Among Governments > Full Faith & Credit

HN4 The very purpose of the [Full Faith and Credit Clause](#) was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Constitutional Law > Relations Among Governments > Full Faith & Credit

Governments > Legislation > Types of Statutes

HN5 Courts consistently uphold, on the basis of evaluated public policy, the law of the state of incorporation of a fraternal benefit society as the law that should control the validity of the terms of membership in that corporation.

Constitutional Law > Relations Among Governments > Full Faith & Credit

Governments > Legislation > Types of Statutes

HN6 It is of the essence of the [Full Faith and Credit Clause](#) that, if a state gives some faith and credit to the public acts of another state by permitting its own citizens to become members of, and benefit from, fraternal benefit societies organized by such other state, then it must give full faith and credit to those public acts and must recognize the burdens and limitations which are inherent in such memberships.

Lawyers' Edition Display

Headnotes

CONFLICT OF LAWS, §5 > full faith and credit to law of sister state limiting time for suit on fraternal benefit certificate. -- > Headnote:

LEdHN[1] [1]

The [full faith and credit clause](#) requires the court of the forum, in an action against a fraternal benefit society incorporated in another state and licensed to do business in the state of the forum, on a benefit certificate issued to a citizen of the state of the forum, to give effect to a provision of the constitution of the society valid under the law of the state of its incorporation limiting the time for such an action to a period less than that fixed by the law of the forum which also declares void any contractual stipulation abridging such period.

CONFLICT OF LAWS, §5 > full faith and credit to law of sister state -- right of assignee to urge counter-considerations based on assignor's citizenship. -- > Headnote:

LEdHN[2] [2]

The fact that the assignment to a citizen of Ohio by a South Dakota beneficiary of her claim on a benefit certificate issued to a South Dakota citizen by a fraternal benefit society incorporated in Ohio has eliminated the beneficiary's citizenship as a jurisdictional factor, does not preclude such assignee from urging the courts to consider the continuous South Dakota residence and citizenship of the decedent and of the named beneficiary in determining whether the public policy of South Dakota evinced by a statute declaring void any contractual stipulation abridging the statutory limitation period should yield to the [full faith and credit clause of the Constitution of the United States](#) in giving recognition to such an abridgment by the provisions of the charter of the society.

Limitation of Actions, §5 1/2 > limitation by contract -- validity. -- > Headnote:

LEdHN[3] [3]

In the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the

parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period (dictum).

CONSTITUTIONAL LAW, §784 > due process -- protection of contractual limitation of time to sue. -- > Headnote:

LEdHN[4] [4]

Contractual limitations of time for bringing suit to a shorter period than that prescribed by the statute of limitations are, if reasonable, entitled to the constitutional protection of the [Fourteenth Amendment](#) (dictum).

Syllabus

1. An Ohio citizen brought an action in a state court in South Dakota against a fraternal benefit society, incorporated in Ohio and licensed to do business in South Dakota, to recover benefits claimed to have arisen under the society's constitution as a result of the death of an insured member who had been a citizen of South Dakota throughout his membership. The society's constitution, which was valid in Ohio, prohibited the bringing of an action on such a claim more than six months after its disallowance by the society. The action was brought after expiration of this time but before the expiration of the period prescribed by South Dakota law for commencing suits on contracts. A statute of South Dakota declared void every stipulation or condition in a contract which limits the time within which a party thereto may enforce his rights by usual legal proceedings in the ordinary tribunals. *Held*: The Federal Constitution requires South Dakota to give full faith and credit to the public acts of Ohio under which the society was incorporated, and the claimant was bound by the six-month limitation upon bringing such an action. Pp. 588-589, 624-625.

2. A claim based on membership rights under the constitution of an incorporated fraternal benefit society, the terms of which are subject to amendment through the processes of a representative form of government authorized by the law of the state of incorporation, differs from a claim for benefits under an ordinary contract of accident insurance whether issued by a stock or a mutual insurance company. Pp. 600, 606.

3. It is of primary significance from the legal point of view in this case that the society is a voluntary fraternal

association organized and carried on not for profit but solely for the mutual benefit of its members and their beneficiaries, and has a representative form of government which shall make provision for the payment of benefits in accordance with certain statutory requirements. P. 605.

4. Relationships between the members of fraternal benefit societies are contractual in that they are undertaken voluntarily in consideration of the like obligations of others; but, interwoven with their financial rights and obligations, they have other common interests incidental to their memberships, which give them a status toward one another that involves more interdependence than arises from purely business and financial relationships. Pp. 605-606.

5. Membership in a fraternal benefit society is governed by the law of the state of incorporation; control over its terms is vested in the elected representative government of the society as authorized and regulated by that law. P. 606.

6. By virtue of the *full faith and credit clause*, the people of the **United** States have imposed upon the general rules governing conflicts of laws respecting statutes of limitations on claims arising out of ordinary contracts another limitation, giving effect to a limitation contained, as in the present case, in the constitution of a fraternal benefit society. P. 607.

7. Fraternal benefit societies exist by virtue of the laws of the states of their incorporation, and the rights and obligations incident to membership in them are as much entitled to full faith and credit as the statutes upon which they depend. P. 609.

8. To permit recovery in this case would fail to give full faith and credit to the terms of membership authorized by Ohio by placing an additional liability on the society beyond that authorized by Ohio or accepted by the society. P. 610.

9. The weight of public policy behind the general statute of South Dakota, which seeks to avoid contractual limitations upon rights to sue on ordinary contracts, does not equal that which makes necessary the

recognition of the same terms of membership for members of fraternal benefit societies wherever their beneficiaries may be -- especially where the State, with full information as to those terms of membership, has permitted such societies to do business and secure members within its borders. P. 624.

10. If a state gives *some* faith and credit to the laws of another state by permitting its own citizens to become members of, and benefit from, fraternal benefit societies organized by such other state, it must give *full* faith and credit to those laws and must recognize the burdens and limitations which are inherent in such memberships. P. 625.

Counsel: Byron S. Payne and E. W. Dillon argued the cause on the original argument, and Mr. Dillon on the reargument, for petitioner. With them on the brief was Samuel Herrick.

Hubbard F. Fellows argued the cause and filed a brief for respondent.

Judges: Vinson, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton

Opinion by: BURTON

Opinion

[*588] [**1356] [***1690] MR. JUSTICE BURTON delivered the opinion of the Court.

LEdHN[1] [1]This is an action in a circuit court of the State of South Dakota, brought by an Ohio citizen against a fraternal benefit society incorporated in Ohio, to recover benefits claimed to have arisen under the constitution of that society as a result of the death of an insured member who had been a citizen of South Dakota throughout his membership. The case presents the question whether the *full faith and credit clause of the Constitution of the United States*¹ required the court of the forum, South Dakota, to give effect to a provision of the constitution of the society prohibiting the bringing of an action on such a claim more than six months after the disallowance of the claim by the Supreme Executive

¹ "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." [U.S. Const. Art. IV, § 1](#). See also, Act of May 26, 1790, 1 Stat. 122; Act of Mar. 27, 1804, 2 Stat. 298; Rev. Stat. §§ 905, 906, [28 U. S. C. §§ 687, 688](#).

Committee of the society,² [*589] when that provision was valid under the law of the state of the society's incorporation, Ohio, but when the time prescribed generally by South Dakota for commencing actions on contracts was six years³ and when another statute of South Dakota declared that --

"Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."⁴

We hold that, under such circumstances, South Dakota, as the state of the forum, was required, by the Constitution of the **United States**, to give full faith and credit to the public acts of Ohio under which the fraternal benefit society was incorporated, and that the claimant

was bound by the six-month limitation upon bringing suit to recover death benefits based upon membership rights of a decedent under the constitution of the society. This has been the consistent view of this Court.⁵

[***1691] The record in the present case well illustrates both the practical effect of such a limitation as that contained in the constitution of this society and the need for the application of the [full faith and credit clause](#) to membership obligations in fraternal benefit societies.

[*590] The petitioner, The **Order of United Commercial Travelers** of America, was incorporated in 1888, under the general corporation laws of Ohio.⁶ By 1920, when the decedent, Ford Shane, of Rapid City, [**1357] South Dakota, became [*591] a member, this fraternal benefit society was in active operation in many states. Then, and at his death in 1931, it was regulated in detail by the General Code of Ohio. That Code included public

² "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee." From § 11 of Article IV, "Insurance," of the constitution of The **Order of United Commercial Travelers** of America, as printed on the back of the original certificate of membership issued to decedent August 19, 1920, and as in effect at the filing of this action June 15, 1934.

³ § 2298, S. D. Rev. Code, 1919.

⁴ § 897, S. D. Rev. Code, 1919.

⁵ [Royal Arcanum v. Green](#), 237 U.S. 531; [Modern Woodmen v. Mixer](#), 267 U.S. 544; [Broderick v. Rosner](#), 294 U.S. 629; [Sovereign Camp v. Bolin](#), 305 U.S. 66. See also, [Pink v. A. A. Highway Express](#), 314 U.S. 201, 207, 210-211.

⁶ As in effect September 1, 1930, and presumably at the member's death, May 8, 1931, the articles of incorporation contained only the following provisions:

"WITNESSETH: That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, not for profit, under the general corporation laws of said State, do hereby certify:

"FIRST. The name of said corporation shall be THE **ORDER OF UNITED COMMERCIAL TRAVELERS** OF AMERICA.

"SECOND. Said corporation shall be located, and its principal business transacted at Columbus, in Franklin County, Ohio.

"THIRD. The purpose for which said corporation is formed is:

"1st. To **unite** fraternally all **Commercial Travelers**, Wholesale Salesmen and such other persons of good moral character as are now or may hereafter become eligible to membership, under the provisions of the Constitution of the **Order**.

"2nd. To give all moral and material aid in its power to its members and those dependent upon them. Also to assist the widows and orphans of deceased members.

"3rd. To establish funds to indemnify its members for disability or death resulting from accidental means.

"4th. To secure just and equitable favors for **Commercial Travelers** and Wholesale Salesmen as a class.

"5th. To elevate the moral and social standing of its members.

"6th. Said corporation shall be a secret **Order**.

"7th. To establish a Widows' and Orphans' Reserve Fund."

This society is strikingly similar in form to the "fraternal beneficiary association," incorporated in Massachusetts in 1877 and described in the leading case on this subject, [Royal Arcanum v. Green](#), 237 U.S. 531. As to that association it was said by the Supreme Court of Massachusetts that:

acts of Ohio on such subjects as the following: § 9462, Fraternal benefit society defined; ⁷ § 9463, Lodge system; § 9464, Representative form of government, including restrictions on amendments to its constitution; § 9465, Exemption from general insurance laws of the State; § 9466, Benefits; § 9467, To whom benefits shall be paid, stating limitations on the degrees of family relationship permitted to exist between a member and those whom he may designate to receive benefits as a result of his death; § 9468, Age limits for admission to membership; § 9469, [***1692] Certificate shall constitute agreement; ⁸ § 9469-1, Exception as to **commercial travelers**; ⁹ [*592] § 9470, Investment, disbursement and application [**1358] of funds; § 9481, Laws of society shall be binding on members and beneficiaries, and the society may provide, as here, that no subordinate body, officers or members may waive any of the provisions of the laws and constitution of the society. ¹⁰ These public acts have created and regulated the society and the rights and obligations of its members.

They are reflected in its articles of incorporation, constitution and by-laws. They make possible uniformity of rights and obligations among all members throughout the country, provided full faith and credit are given also to the constitution and by-laws of the society insofar as they are valid under the law of the state of incorporation. If full faith and credit are not given to these provisions, the mutual rights and obligations of the members of such societies are left subject to the control of each state. They become unpredictable and almost inevitably unequal.

The principal office of this society has been continuously in Columbus, Ohio. The society has established subordinate councils in many states and, at all times involved in this case, has been licensed to do business in South [*593] Dakota as a foreign fraternal benefit society. ¹¹ In accordance [***1693] with the requirements [**1359] for maintaining such license in good standing, the society has kept on file, with the Commissioner of

"The fraternal plan, with mutuality and without profit, distinguishes the work of such an association from a **commercial** enterprise. It is a charitable and benevolent organization, with a limitation of membership to a special class, and a limitation upon the choice of beneficiaries." *Reynolds v. Royal Arcanum*, 192 Mass. 150, 155, 78 N. E. 129, 131.

⁷ "SEC. 9462. . . . Any corporation, society, **order**, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 5 [G. C. § 9466] hereof, is hereby declared to be a fraternal benefit society." Ohio Gen. Code, 1931.

⁸ "SEC. 9469. . . . Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, of, if a voluntary association, the articles of association, the constitution and laws of the society and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to such charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the members and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership." Ohio Gen. Code, 1931.

⁹ "SEC. 9469-1. . . . The provisions of section ninety-four hundred and sixty-nine of the General Code, requiring the certificate to specify the maximum amount of benefit provided thereby and the conditions governing the payment thereof, shall not apply to the certificates of a fraternal beneficiary association organized under the laws of Ohio, whose membership consists of **commercial travelers** and which does not obligate itself to pay stipulated amounts of benefits in case of natural death." Ohio Gen. Code, 1931.

¹⁰ "SEC. 9481. . . . The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members." Ohio Gen. Code, 1931.

¹¹ S. D. L., 1919, c. 232, § 16, authorized the issuance of such a license --

"upon filing with the Commissioner a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officers; a power of attorney to the Commissioner [to accept service of process] . . . ; a statement of its business under oath of its president and secretary, or corresponding officers, in the form required by the

Insurance of South Dakota, a copy of the society's constitution, including § 11 of Article IV, here [*594] in controversy, limiting the time for bringing suits to recover claims for benefits based upon that Article. The state of the forum thus has been continuously in a position to revoke or refuse to renew the society's license to do business in that State if it had good reason to do so. There is no evidence that South Dakota has attempted or suggested such action. The favorable, rather than hostile, attitude of South Dakota towards such societies is evidenced by its own authorization of their incorporation in that State on terms identical, word for word, with those prescribed in Ohio.¹²

The decedent, on July 31, 1920, applied for membership in the society through Rapid City Council No. 516, in Rapid City, South Dakota. He was 37 years old, a manager and salesman selling "packing products" on

the road, in good physical condition and employed in an occupation of precisely the type contemplated for membership in this society.¹³ He named his wife as his beneficiary in case of [*595] his death from accidental means. On August 19, 1920, he was accepted by the Supreme Council as an insured member [***1694] of the society under "Class A." The certificate, No. 169655, evidencing this acceptance was executed at Columbus, Ohio, by the Supreme Counselor and Supreme Secretary. In 1922, following a brief suspension, he applied for reinstatement in what was then Black Hills Council No. 516 in Rapid City, South Dakota, and, on December 21, 1922, was reinstated as an insured member of the society under "Class A." In his application for this renewal, he referred to himself as a traveling salesman, selling meat to dealers, and named his mother, Elizabeth Shane of Mt. Vernon, South Dakota,

Commissioner, duly verified by an examination made by the supervising insurance official of its home State or other State satisfactory to the Commissioner of Insurance of this State; a certificate from the proper official in its home State, province or country, that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical, or other payments by persons holding similar contracts; and upon furnishing the Commissioner such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the State, territory, district, province or country where it is organized, he shall issue a license to such society to do business in this State until the first day of the succeeding March, and such license shall, upon compliance with the provisions of this Act, be renewed annually, but in all cases to terminate on the first day of the succeeding March; provided, however, that license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign society desiring admission to this State, shall have the qualifications required of domestic societies organized under this Act, upon a valuation by any one of the standards authorized in Section 23a of this Act, and have its assets invested as required by the laws of the State, territory, district, country, or province where it is organized. For each such license or renewal the society shall pay the Commissioner Two (\$ 2.00) Dollars. When the Commissioner refuses to license any society, or revokes its authority to do business in this State, he shall reduce his ruling, order or decision to writing and file the same in his office, and shall furnish a copy thereof, together with a statement of his reason, to the officers of the society, upon request, and the action of the Commissioner shall be reviewable by proper proceedings in any court of competent jurisdiction within the State,"

See also, §§ 31.2124-31.2126, 31.2139, S. D. Code of 1939. The State of Ohio has similar provisions in its Code. § 9477, Ohio Gen. Code, 1931.

¹² "An Act Providing for the Regulation and Control of All Fraternal Benefit Societies," approved Mar. 11, 1919, S. D. L., 1919, c. 232, pp. 240-253. For example, § 1 defines them as follows:

"Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with Section 5 hereof, is hereby declared to be a Fraternal Benefit Society."

See also, c. 31.21, "Fraternal Benefit Societies," S. D. Code of 1939, and cf. with Ohio definition in note 6, *supra*.

¹³ "SEC. 2. Any white male citizen of the United States or British possessions in North America of good moral character and good general health, not under eighteen (18) and not over sixty (60) years of age, who has been actively and actually engaged for a term of not less than six months immediately preceding the date of his application as a commercial traveler, city salesman, wholesale house salesman, sales manager or merchandise broker, selling goods at wholesale or selling office, store, factory, railroad, mill or municipal equipment, for a manufacturer or wholesale dealer, or one who has had at least six months experience in either of the occupations named herein, and is thus engaged at the date of filing the application, and who is in good mental and physical condition may become a member of this Order if found acceptable." Art. II, constitution of the society, 1922.

as his beneficiary.¹⁴ [*596] Thereafter, he remained in good standing and [**1360] it is upon his membership, evidenced by this certificate, also executed in Ohio, that this action depends. On May 8, 1931, he visited a physician's office in Rapid City, South Dakota, to be examined for stricture. The doctor applied a local anesthetic preliminary to introducing an instrument known as a "sound" for exploratory purposes. The local anesthetic was a drug known as "butyn." The record shows that butyn commonly was used by physicians for such a purpose; that it was properly administered in the usual and proper amount and was of the usual and proper strength; but that the decedent, unknown to anyone, was subject to a [*597] rare idiosyncrasy, as a result of the presence of which he suffered convulsions immediately following the administration of the anesthetic and died within two minutes.

In accordance with the procedure prescribed in the constitution of the society, the decedent's beneficiary promptly mailed to the society a notice of her son's death. On June 8, 1931, the Supreme Executive Committee, in Columbus, Ohio, reviewed and disallowed her claim on its merits and mailed to her notice of such action. On June 16, she filed a complaint against the society in a circuit court for the State of South Dakota to recover death benefits, amounting to \$ 6,300, claimed under Article IV of the constitution of the [***1695] society. The case was removed to the United States District Court for South Dakota because of diversity of citizenship. On September 2 it was tried, without a jury, and, on December 15, 1931, judgment was rendered for the mother with findings of fact and conclusions of law dealing with the merits of the case. This judgment, on February 27, 1933, was reversed, on its merits, by the United States Circuit Court of Appeals

¹⁴ The certificate, No. 169655, then issued to him, and which is the primary basis for the respondent's claim, is as follows:

"INCORPORATED UNDER THE GENERAL LAWS OF THE STATE OF OHIO.

CLASS A

INSURANCE CERTIFICATE

THE ORDER OF

UNITED COMMERCIAL TRAVELERS

OF AMERICA

COLUMBUS, OHIO

"An Association incorporated under the laws of the state of Ohio, hereby certifies that Ford Shane, a member of The Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an Insured Member of said Order under 'Class A,' beginning at twelve (12) o'clock, noon, Standard time, on the day this certificate is dated, and is entitled to all the rights and benefits which may be provided for such 'Class A' Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date.

"This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payment of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.

"IN WITNESS WHEREOF, we have affixed our signatures and the seal of the Supreme Council, at Columbus, Ohio, this 21st day of December A. D. 1922.

"This certificate supersedes all insurance certificates issued of a prior date bearing this number.

s/ FRANK J. ROSSER

Supreme Counselor.

s/ WALTER D. MURPHY

Supreme Secretary."

SEAL

for the Eighth Circuit and judgment for costs was entered against Elizabeth Shane. [64 F.2d 55](#).¹⁵ Upon remand [*598] of the [**1361] case to it, the District Court, on April 18, 1933, **ordered** "that the Judgment of the United States Circuit Court of Appeals in this matter be made the Judgment of this Court, and that all costs of this Court relating to such Mandate and Judgment, be taxed and allowed the defendant." (Unreported.) Thus, within less than two years, the case had been completely presented and heard by the District Court and the Circuit Court of Appeals and disposed of, on its merits, in favor of the society, with full recognition of the diversity of citizenship of the parties and in compliance with the time limits prescribed by the constitution of the society.

The present proceeding, however, resulted from the fact that, pursuant to stipulation of the parties, the District Court, on January 18, 1934, dismissed the case without prejudice to the filing of another suit. On June 15, 1934, the decedent's mother assigned her claim to Edward C. Wolfe, the present respondent, a citizen of Ohio, as trustee, to enforce collection of the claim. On the same day, the present action was filed in a circuit court of the State of South Dakota. An answer was entered and a stipulation was made to use the testimony which had been taken in the District Court in the previous case. There the case rested for six years. On October 19, 1940, an amended answer was filed raising, among others, the defense that this second action was in violation of the following Section of the constitution of the society:

[*599] "ARTICLE IV. INSURANCE.

. . . .

Waivers.

"SEC. 11. No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee.

"No Grand or Subordinate Council, officer, member or agent of any Subordinate, Grand, or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be hereafter enacted."

[***1696] It is not disputed that such provision has been in such constitution since before the decedent's first application for membership in the society, and that it was printed in full on the back of the certificate of membership originally issued to the decedent. It further was alleged that this provision was valid and binding upon the members of the society by and under the laws of Ohio; that the highest court of that State had held that a fraternal benefit society, by its constitution and by-laws, could limit the time within which suit must be brought to recover for benefits promised to members; and that to deny the binding effect of that limitation on the plaintiff in such suit would be a violation of the full faith and credit clause of the Constitution of the United States (Art. IV, § 1), and a violation of the society's rights thereunder. We decide that issue here in favor of the society. No claim is made here that the society is barred from this defense by any waiver purporting to have been made on its behalf in connection with the dismissal of the earlier action without prejudice to filing another. See [Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386](#).

[*600] In this view of the case, it is not necessary to consider the other defenses.

¹⁵ The Circuit Court of Appeals evidently relied, in part, on Article IV, § 7, of the constitution of the society which stated "Nor shall benefits under this Article be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability or loss" and said:

"There were no accidental means, but simply an unexpected or accidental result. The administration of the drug did not cause the idiosyncrasy, and, if the bodily injury which resulted in death was produced by the idiosyncrasy as a cause or means, then the administration of the drug was not the sole cause, and there would be no liability under the policy." [64 F.2d 55, 59](#).

Relating to a provision in the same section that "This Order shall not be liable to any person for any benefits for any death, . . . resulting from . . . medical, mechanical or surgical treatment (except where the surgical treatment is made necessary by the accident), the intentional taking of medicine or drugs"; the Circuit Court of Appeals said:

"We think the administering of the drug must be placed in the category of medical or surgical treatment.

. . . .

"If the administering of the drug in the case at bar did not constitute medical or surgical treatment, we should be at a loss how to classify such act." [Id. at 59-60](#).

In 1942, the case was presented before a judge of a circuit court of the State of South Dakota. Upon the death of that judge before a decision in the case, it was heard, in 1943, by another judge of that court, largely upon the record made, in 1931, in the *United States District Court*. The state court, on April 4, 1944, entered judgment in favor of the claimant, respondent herein. In 1945, the Supreme Court of the State of South Dakota, by a divided court, affirmed that judgment. [70 S. D. 452, 18 N. W. 2d 755](#). Because of the constitutional issue presented and its relation to previous decisions of this Court, we granted certiorari. [326 U.S. 712](#). The case was argued here February 28, 1946. Later it was restored to the docket, assigned for reargument before a full **[**1362]** bench and reargued here November 12, 1946.

This is a clear-cut case of a claim based solely upon membership rights and obligations contained in the constitution of an incorporated fraternal benefit society, the terms of which are subject to amendment through the processes of a representative form of government authorized by the law of the state of incorporation. There is no evidence in the records of the three trials, no suggestion in the opinions of the lower courts, and no claim in the arguments here that the decedent was not a bona fide active member of the society, or that the society was acting otherwise than as a fraternal benefit society. This case, therefore, is to be distinguished from a claim for death benefits under an ordinary contract of accident insurance, whether issued by a stock or a mutual insurance company.

We rely upon the character of the membership obligation sued upon. There is substantial evidence to support a contention that the contract of membership, including all insurance rights, was made in Ohio and that many **[*601]** acts in connection with the contract were required to be performed in Ohio and were so performed. However, we do not rely upon the place of concluding the contract of membership or upon the place prescribed for its performance. We rely, rather, upon its character as something created, regulated and subject to change through a fraternal and representative form of intra-corporate government, dependent for its terms, continuity and unity upon public acts of Ohio creating and regulating fraternal benefit societies.

LEdHN[2] [2]Although the respondent, suing as an Ohio citizen, has eliminated the South Dakota citizenship of the original beneficiary as a jurisdictional factor in this case, we do not hold that, for that reason, he may not **[***1697]** urge the courts to consider the continuous South Dakota residence and citizenship of the decedent and of the named beneficiary in determining whether the public policy of South Dakota should yield to the [full faith and credit clause of the Constitution of the United States](#) in giving recognition to the charter rights and obligations of the society as an Ohio corporation.

In *order*, however, to appreciate the nature of the obligation here relied upon, it is essential to see how completely its terms are interwoven with the enabling legislation authorizing the corporate charter and with the constitution and by-laws of the society, as well as with the member's application for and his certificate of membership in such society.

The enabling legislation, corporate charter and certificate of membership have been described. The application for membership contributes nothing further to the issue except to emphasize the integration which it demonstrates between the member and the articles of incorporation, constitution and by-laws of his society. There was no application for insurance separate from the application **[*602]** for membership. Benefits derived from membership flowed solely from the decedent's membership status.

There remain to be considered the constitution and by-laws of the society. These set forth the main body of the member's rights and obligations, including those of a fraternal and procedural nature as well as those relating to financial benefits and liabilities. The principal part of the record consists of printed copies of the charter, constitution and by-laws of the society, one as generally effective September 1, 1922, and the other as effective September 1, 1930. A comparison of these copies shows that many changes were made in the rights and obligations of members during the decedent's membership in the society.¹⁶

[1363]** The 1930 constitution, in pamphlet form, filled 90 closely printed pages. Its subject matter is outlined in

¹⁶ Typical of these changes were those relating to the distribution, on a changed percentage basis, of funds raised by calls to meet insurance and other needs; changes in the classification of employments to be treated as hazardous enough to require the lowering of rates of disability benefits to be paid to members employed in them; and a new provision expressly recognizing the rights of uninsured members to continue as members of the society, although disqualified physically from taking advantage of insurance benefits. There also was a change in the procedure governing future amendments.

the margin.¹⁷ It is obvious [***1698] how vital these terms, both in detail and as a whole, were to each member. The by-laws filled six pages. They consisted [**1364] of 29 paragraphs [*603] dealing with the conduct of meetings of the Subordinate (or local) Councils, Grand (or regional) Councils [***1699] and the Supreme (national or international) Council. Under such a constitution it is impossible to separate the

¹⁷ The 1930 constitution dealt with the following subjects and it is in them, as amended from time to time, that there can be found the rights and obligations of the members:

Article I. Name, Objects, Provision for Subordinate Councils, Grand Councils and The Supreme Council.

Article II. Subordinate Councils, Membership, Withdrawals, Transfer Cards, Delinquency, Suspensions, Reinstatement, Uninsured Membership, Officers and Elections, Duties of Officers, Vacancies in Office, Honorary Titles, Meetings and Quorum, Special Sessions, Reports, Per Capita Tax to Council having control and jurisdiction over the Subordinate Council, and Representation of Subordinate Councils in the Grand Council.

Article III. Funds, Provision for Widows' and Orphans' Fund, Assessment Fund, Distribution of Assessment Fund, Death Fund, Disability Fund, General Expense Fund and Reserve Funds. The Assessment Fund is created by assessments on insured members, in good standing, to provide a basis for meeting assessment calls. When calls are made upon such members, the proceeds are apportioned 30% to the Death Fund, 40% to the Disability Fund, 5% to the Reserve Funds and 25% to the General Expense Fund.

Article IV. Insurance. Members in good standing are subject to regular quarterly calls of \$ 3 per insured member and the Supreme Counselor has the right to make as many calls, in an amount not to exceed \$ 3 each, as may be required to pay in full all valid claims, together with expenses incurred in maintaining the society and conducting its business. Based on their physical condition, members become insured members of Class A or Class B. Those providing the poorer risk are put in Class B and are entitled to benefits of but one-half the amount of those provided for Class A members. The benefits are in the nature of indemnities against the result of bodily injuries "effected through external, violent and accidental means, . . . which shall be occasioned by the said accident alone and independent of all other causes." There are many limitations upon this liability and, in case of certain changes in the occupation or physical condition of a member, his right to benefits may be reduced or canceled. There are double indemnities for injuries resulting from accidents on passenger trains, etc., and the coverage generally is related to risks normally encountered by commercial travelers. Specific exemptions are made of injuries resulting from engaging in certain hazardous sports or from being under the influence of liquor, etc. Those who may be named as beneficiaries are limited to specified degrees of family relationship. (The form of application makes express reference to the limitations as to beneficiaries contained in the statutes of Ohio.) Provision is made for notices and proofs of claims, for surgical examinations, etc. There is a strict prohibition in § 11 (quoted *supra*) against the waiver of provisions of the constitution and, in the same Section, there appears the six-month limitation, here in controversy, upon the time within which to bring suits to recover benefits after a claim has been disallowed by the Supreme Executive Committee.

Article V. Grand Councils, Charters for Subordinate Councils, Per Capita Tax payable to Grand Councils and detailed provisions for the operation of Grand Councils.

Article VI. Supreme Council, Charters for Grand Councils, Officers and Elections and detailed provisions for the conduct of the business of the Supreme Council, including the establishment of the Supreme Executive Committee. This committee is to consist of seven members, including the Supreme Counselor, Supreme Secretary, Supreme Treasurer and four specially elected members. It has large powers over the business and activities of the society. Among these provisions are those of examining insurance claims, deciding upon their validity and adjusting them.

Article VII. Prohibition of the use of malt or spirituous liquors in connection with meetings of the society.

Article VIII. Memorial Day in honor of the society's first Supreme Secretary.

Article IX. Special duty of every member to report the name of any member who is an extra hazardous, physical or moral risk.

Article X. Prohibition against donations of funds of the society.

Articles XI, XII and XIII. Trials, Penalties and Appeals relating to violations of the Constitution, By-Laws and Rules, and the divulging of secrets of the society or conduct unbecoming a gentleman.

"ARTICLE XIV. AMENDMENTS. Section 1. Proposed amendments to this Constitution, By-Laws and Articles of Incorporation shall be submitted in writing and filed with the Supreme Secretary of the Order at least six (6) months before the convening of the annual session of the Supreme Council.

member's [*604] insurance rights and obligations from his other rights and obligations. While the statute authorizing the incorporation of fraternal benefit societies calls for "a lodge system with ritualistic form of work" and this is a natural [*605] expression of a close community of interest among members of a fraternal benefit society, yet it is not the formality of any ritual that is of primary significance from the legal point of view in this case. The more critical factors are that the society is a voluntary fraternal association "organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a . . . representative form of government, and which shall make provision for the payment of benefits" in accordance with certain statutory requirements.¹⁸ Historically, many groups of people have been drawn together naturally into fraternal organizations for social and economic reasons. Some of these have developed into those forms of fraternal benefit societies now officially recognized by many states. The relationships between the members of such societies are contractual in that they are voluntarily undertaken in consideration of the like obligations of others. However, interwoven with their financial rights and obligations, they have other common interests incidental to their memberships, which give them a status toward one another that involves more mutuality of interest and more interdependence than arises [*606] from purely business and financial relationships. This creates --

"The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law, . . . The act of becoming a member is something more than a

contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation."¹⁹

The relationship thus established between a member and his fraternal benefit society differs from the ordinary contractual relationship between a policyholder and a separately owned corporate or "stock" insurance company. It differs also from that between an insured member of the usual business form of a mutual insurance company and that company. The fact of [*1365] membership in the Ohio fraternal benefit society is the controlling and central feature of the relationship. As long as he remains a member, the terms of his membership, including obligations and benefits relating to the insurance funds of the society, are subject to change without his individual consent. The control over those terms is vested by him and his fellow members in the elected representative government of their society as authorized and regulated by the law of Ohio. Upon that law the continued existence of the society depends. The foundation of the society is the law of Ohio. It provides the unifying control over the rights and obligations of its members. *Sovereign Camp v. Bolin*, 305 U.S. 66, 75, discussed *infra*. It is this dependence of membership rights upon the public acts of the domiciliary state, supported by the requirement that [*607] full faith and credit shall be given in each state to those public acts, that has been recognized by this Court in the unbroken line of decisions reviewed in this opinion.

***1700 The decisions passing upon this comparatively narrow issue are to be distinguished from those which deal only with the well-established principle of conflict of

"The Supreme Secretary of the Order shall, at least four (4) months before the convening of such annual session, forward to all Grand and Subordinate Councils a copy of the proposed amendments.

"SEC. 2. No amendment to the Constitution, By-Laws or Articles of Incorporation shall be adopted unless it receives the affirmative vote of at least two-thirds (2-3) [2/3] of the members of the Supreme Council present, entitled to vote, at the session when such amendment is voted upon.

"SEC. 3. All amendments to this Constitution, By-Laws and Articles of Incorporation shall take effect on the first day of September following the session of the Supreme Council at which they were adopted, unless the date for becoming effective is otherwise specified by the Supreme Council.

"SEC. 4. All recommendations or resolutions adopted by the Supreme Council which adds [add] to or conflict with this Constitution or By-Laws shall be presented to the Supreme Council at its next annual session as an amendment to the Constitution or By-Laws and shall not become effective until such amendments have been approved by a two-thirds vote of the members present entitled to vote." (Section 4 was added between 1922 and 1931.)

¹⁸ See note 7, *supra*.

¹⁹ *Modern Woodmen v. Mixer*, 267 U.S. 544, 551.

laws that "If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose." *Restatement, Conflict of Laws § 603* (1934). It is to that general principle that such early cases as *Hawkins v. Barney's Lessee*, 5 Pet. 457, and *M'Elmoyle v. Cohen*, 13 Pet. 312, have reference. The decisions here reviewed are to be distinguished, likewise, from those supporting the converse general principle that "If action is not barred by the statute of limitations of the forum, an action can be maintained, though action is barred in the state where the cause of action arose." *Restatement, Conflict of Laws § 604* (1934). Neither of these general statements is here questioned. An obvious need for modification of the latter statement, however, has led many states to place a limitation upon it through the adoption of the so-called "borrowing statutes" of limitations. The result is that today **HN1** "Statutes frequently provide that an action may not be maintained if it has been barred by the statute of limitations at the place where the action accrued or, in some cases, at the domicil of the defendant." *Id.* § 604, comment *b*. These numerous "borrowing statutes" demonstrate the general recognition of the sound public policy of limiting, under some circumstances, the application of the general statute of limitations of the state of the forum. The *full faith and credit clause* applied, as in the present case, is but another limitation voluntarily imposed, by the people of the *United States*, upon the sovereignty of their respective states in applying the law of the forum. See *Broderick v. Rosner*, 294 U.S. 629, 643, and *Milwaukee [*608] County v. White Co.*, 296 U.S. 268, 276-277, discussed *infra*.

LEdHN[3][3]**LEdHN[4]**[4] Even without the compelling force of statutory or constitutional provisions, the courts have recognized other restrictions on the law of the forum. For example, it is well established that, **HN2** in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period

itself shall be a reasonable period.²⁰ Such shorter periods, written into private contracts, also have been held to be entitled to the constitutional protection of the *Fourteenth Amendment* under appropriate circumstances. See *Home Ins. Co. v. Dick*, 281 U.S. 397, *****1366** and *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, mentioned again *infra*.

The instant case presents additional facts which distinguish it from the cases governed by the foregoing *****1701** general rules. The principal distinguishing feature of this case is the membership of the decedent in the Ohio fraternal benefit society, which South Dakota made available to him through the license issued to it to do business in South Dakota. Even conceding, for purposes of argument, **[*609]** that the decedent's membership contract was entered into in South Dakota, rather than where it was accepted at the society's home office in Ohio, it is the character of that fraternal benefit membership, created and defined by the laws of Ohio and fostered by the fraternal benefit laws of South Dakota, that is at issue. Conceding further that, as interpreted in this case by the Supreme Court of South Dakota, the provision of § 897 of the South Dakota Code (quoted near the beginning of this opinion), generally outlawing contractual time limits on the enforcement of contractual rights by legal proceedings, is an attempt to make void the time limit included in § 11 of Article IV of the constitution of this Ohio fraternal benefit society, we then are brought face to face with the *full faith and credit clause of the Constitution of the United States*. It is here that we reach the line of decisions of this Court, extending from *Royal Arcanum v. Green*, 237 U.S. 531, to *Pink v. A. A. Highway Express*, 314 U.S. 201, 207-208, 210-211, discussed *infra*. These decisions are directly in point. Without questioning this Court's recognition of the common law principle of conflict of laws as to the control by each state over the application of its own statutes of limitations, this line of decisions demonstrates this Court's simultaneous recognition of the necessary scope of the *full faith and credit clause* in this field. These cases unwaveringly safeguard, in each state,

²⁰ "The policy of these statutes [of limitation] is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose, but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims." *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386, 390; approved, *Thompson v. Phenix Ins. Co.*, 136 U.S. 287, 298.

See also, *Appel v. Cooper Ins. Co.*, 76 Ohio St. 52, 80 N. E. 955; *Bartley v. National Business Men's Assn.*, 109 Ohio St. 585, 143 N. E. 386; *Young v. Order of United Commercial Travelers*, 142 Neb. 566, 7 N. W. 2d 81; *Burlew v. Fidelity & Casualty Co. of N. Y.*, 276 Ky. 132, 122 S. W. 2d 990; see note, 121 A. L. R. 758; 29 Am. Jur. 1039.

the effectiveness of the public acts of every other state as expressed in the rights and obligations of members of fraternal benefit societies. **HN3** Such societies exist by virtue of such state legislation, and the rights and obligations incident to membership therein are as much entitled to full faith and credit as the statutes upon which they depend.

The respondent's claim to benefits is based upon Item (12) of § 4 of Article IV of this constitution which specifies [*610] the death benefits derived from the membership of "Class A" members. The prohibition limiting the time for suing on this claim, which is relied upon as the defense of the society, appears as § 11 of the same Article IV. Section 11 deals with the decedent's membership relationship to the society no less than does § 4. The limitation, resulting from § 4, on the amount of the benefit to be paid to beneficiaries and the limitation, resulting from § 11, on the time when litigation may be brought by beneficiaries, are of comparable character. To permit recovery here would be to permit recovery on a special and unauthorized type of membership more favorable to decedent than was available to other members. This would fail to give full faith and credit to the terms of membership authorized by Ohio by placing an additional liability on the society beyond that authorized by Ohio or accepted by the society.

Underlying the defense of the society is the requirement that § 11 be valid under the law of Ohio as the State of incorporation. Such validity was admitted by the Supreme Court of South Dakota in its opinion below. 70 S. D. 452, 18 N. W. 2d 755, 756. "The parties to a contract of insurance may, by a provision inserted in the policy, lawfully limit the time within which suit [**1367] may be brought thereon, provided the period of limitation fixed be not unreasonable." Appel v. Cooper Ins. Co., 76 Ohio St. 52 (Syllabus, No. 1, by the court), 80 N. E. 955. The court there enforced a clause in a fire insurance policy providing that no action for recovery [***1702] of any claim shall be sustainable in any court unless commenced within six months after the fire itself, even though such actions were prohibited during most of the first three of those six months. In Bartley v. National Business Men's Assn., 109 Ohio St. 585, 143 N. E. 386,

the Supreme Court of Ohio approved the *Appel* case and applied it to a two-year [*611] contractual limitation for suing an Ohio mutual protective association on a claim for accidental death. See also: Modern Woodmen v. Myers, 99 Ohio St. 87, 124 N. E. 48, upholding a strict adherence to limitations stated in the by-laws of fraternal benefit societies; Portage County Mutual Fire Ins. Co. v. West, 6 Ohio St. 599, emphasizing the reasonableness of short periods for commencing suits on claims against mutual companies; Young v. Order of United Commercial Travelers, 142 Neb. 566, 7 N. W. 2d 81, recognizing the validity in Ohio of the precise provision of the constitution of the society here at issue, and sustaining its effectiveness in Nebraska by force of the full faith and credit clause of the Constitution of the United States; and Roberts v. Modern Woodmen, 133 Mo. App. 207, 113 S. W. 726, sustaining, in Missouri, a one-year limitation in the insurance contract of an Illinois fraternal benefit society, in the face of a contrary local policy as to Missouri contracts limiting the time within which suits may be instituted. See also, Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386.

Starting with the recognized validity under the law of Ohio, of Article IV, § 11 of the constitution of the petitioning society, that society has a complete defense to the present action unless such § 11 is not enforceable in the courts of South Dakota because of a contrary public policy of that State. We examine first the claim that such a contrary policy exists, and then show why, on the principles established by this Court, the full faith and credit clause of the Constitution of the United States requires the courts of South Dakota to give effect to the public acts of Ohio as expressed in such § 11.

The general statutes of limitations which have been in effect in South Dakota throughout the period involved in this case have prescribed limits varying from 20 years [*612] to one year according to the subject of the action.²¹ "An action upon a contract, obligation or liability, express or implied," was required to be commenced within six years.²² On the other hand the State required the insertion in every health or accident policy issued in the State, a standard contractual provision limiting to two years the time for bringing an action upon it.²³ Throughout this period, the South Dakota statutes,

²¹ §§ 2294-2305, S. D. Rev. Code, 1919; § 33.0232, S. D. Code of 1939.

²² § 2298, S. D. Rev. Code, 1919; § 33.0232 (4), S. D. Code of 1939.

²³ "No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within

moreover, have expressed no hostility toward domestic or foreign fraternal benefit societies. In fact, they have provided for the incorporation, licensing and supervision of such societies in terms closely [*1368] comparable to those of the statutes of Ohio.²⁴

[***1703] Both the alleged prohibition by South Dakota of such a contractual limitation as is contained in § 11 and the public policy of South Dakota against such limitations depend entirely upon its statute directed generally against contractual limitations upon rights to sue on contracts [*613] which is quoted, *supra*, from § 897 of the Revised Code of South Dakota, 1919.²⁵

The public policy so declared is not directed specifically against fraternal benefit societies or their insurance membership requirements. In this very case, however, the Supreme Court of South Dakota, in its decision below, expressly held that this statute applies to and renders void in South Dakota § 11 of Article IV of this society's constitution. We thus are confronted with an inescapable issue as to the unconstitutionality of an attempt, through this statute, to declare void in South Dakota a provision of the constitution of an incorporated fraternal benefit society which comes within the authorization of a public act of the State of Ohio and is valid under the laws of that State. This is not a new issue in this Court. It falls squarely within a line of decisions consistently upholding the applicability of the *full faith and credit clause* in support of comparable provisions in the constitution of such a society.

In *Royal Arcanum v. Green*, 237 U.S. 531, Mr. Chief Justice White, writing on behalf of a unanimous Court, pointed out that the *full faith and credit clause* there required the state of the forum (New York) to give effect to a law of the state of incorporation (Massachusetts) pursuant to which a fraternal benefit society had amended its constitution so as to increase the assessment rate upon the complaining members,

although the trial court had found that their contract of membership was entered into, made and completed in the State of New York, and that under the law of that State, the member would not be bound by [*614] such increase. *206 N. Y. 591, 597, 100 N. E. 411, 412*. In terms which have not been overruled or modified by it in later decisions, this Court there explained why the *full faith and credit clause* requires controlling effect to be given to the law of the state of incorporation in interpreting and determining the enforceability of the rights and obligations of members contained in the constitution and by-laws of such societies. It said:

". . . , as the charter was a Massachusetts charter and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that State, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws. Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding on the one hand that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all but by applying many divergent, variable [***1704] and conflicting criteria. In fact their destructive effect has long since been recognized. *Gaines v. Supreme Council of the Royal Arcanum*, 140 Fed. Rep. 978; *Royal Arcanum v. Brashears*, 89 Maryland, 624. And from this it is certain that when reduced to their last [*1369] analysis the contentions relied upon in effect

two years from the expiration of the time within which proof of loss is required by the policy." § 3 (14), c. 229, S. D. L., 1919, at p. 235.

See also, § 31.1702 (14), S. D. Code of 1939. This section is indicative of a state policy approving the shortening of the general statute as applied to accident policies, but it does not apply directly to or affect transactions of fraternal benefit societies because they are excluded from the general insurance statutes and are placed under the licensing provisions quoted in note 10, *supra*. The petitioner's constitution, filed under that requirement, fully disclosed its provision on this subject. § 12 (3), c. 229, S. D. L., 1919; § 31.1708 (3), S. D. Code of 1939.

²⁴ Notes 11 and 12, *supra*.

²⁵ The present counterpart of that statute appears in § 10.0705 of the South Dakota Code of 1939:

"10.0705. *Restraint of legal proceedings; void*. Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void."

destroy the rights which they are advanced to support, since an [*615] assessment which was one thing in one State and another in another, and a fund which was distributed by one rule in one State and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed. It was doubtless not only a recognition of the inherent unsoundness of the proposition here relied upon, but the manifest impossibility of its enforcement which has led courts of last resort of so many States in passing on questions involving the general authority of fraternal associations and their duties as to subjects of a general character concerning all their members to recognize the charter of the corporation and the laws of the State under which it was granted as the test and measure to be applied." *Id. at 542-543.*

In *Modern Woodmen v. Mixer*, 267 U.S. 544, this Court unanimously followed the same reasoning and Mr. Justice Holmes, in language previously quoted *supra*, emphasized the "complex and abiding relation" of a membership in a fraternal benefit society. He said, "as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation." *Id. at 551.* In that case, the Court held that the *full faith and credit clause* required the state of the forum (Nebraska) to give effect to the law of the state of incorporation (Illinois) pursuant to which a by-law of the fraternal benefit society had been enacted requiring that the continued absence of any member, although unheard from for ten years, should not give his beneficiary the right to recover death benefits until the full term of the member's expectancy of life had expired. This was so held in the face of a rule of law in the state of the forum that seven years of unexplained absence was sufficient to establish death for purposes of such a recovery. This Court stated that neither the public policy of the forum nor the opinion of the Supreme Court of that State that the by-law was [*616] unreasonable, nor the fact that the membership contract had been made in South Dakota, nor the fact that the by-law itself had been adopted several years after the membership relation had commenced, could affect this result. This Court said:

"We need not consider what other States may refuse to do, but we deem it established that they cannot attach to membership rights against the Company that are refused by the law of the domicil. It does not matter that the member joined in another State." *Id. at 551.*

In *Broderick v. Rosner*, 294 U.S. 629, this Court, with Mr. Justice Cardozo noting dissent, applied this principle

to a suit brought in a New Jersey court against certain citizens of New Jersey to recover unpaid assessments levied upon them as stockholders in a bank incorporated under the laws of New York. A New Jersey statute sought to prohibit, in the courts of New Jersey, proceedings for the enforcement of any stockholder's statutory personal liability imposed by the laws of another state, except in suits for equitable accounting, to which the corporation, its legal representatives, and all of its creditors and stockholders were to be necessary parties. Practically, this amounted to an attempt to bar such suits from the New Jersey courts. This Court, however, said "It is sufficient to decide [***1705] that, since the New Jersey courts possess general jurisdiction of the subject matter and the parties, and the subject matter is not one as to which the alleged public policy of New Jersey could be controlling, the *full faith and credit clause* requires that this suit be entertained [without compliance with the special New Jersey statute]." *Id. at 647.*

Mr. Justice Brandeis, in stating the reasoning of the Court in the *Broderick* case, said:

". . . [*1370] the *full faith and credit clause* does not require the enforcement of every right which has ripened into [*617] a judgment of another State or has been conferred by its statutes. See *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 160; *Alaska Packers Assn. v. Industrial Accident Comm'n*, *ante*, p. 532, at p. 546. But the room left for the play of conflicting policies is a narrow one. . . . For the States of the Union, the constitutional limitation imposed by the *full faith and credit clause* abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity.

"Here the nature of the cause of action brings it within the scope of the *full faith and credit clause*. The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York, as the State of incorporation. 'So much so,' as was said in *Converse v. Hamilton*, 224 U.S. 243, 260, 'that no other State properly can be said to have any public policy thereon. . . .' . . . In respect to the determination of liability for an assessment, the New Jersey stockholders submitted themselves to the jurisdiction of New York. For 'the act of becoming a member [of a corporation] is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership

looks to and must be governed by the law of the State granting the incorporation.' [Modern Woodmen of America v. Mixer](#), 267 U.S. 544, 551." ²⁶ *Id.* at 642-644.

[*618] In [Milwaukee County v. White Co.](#), 296 U.S. 268, Mr. Justice Stone, speaking for the Court, said:

HN4 "The very purpose of the [full faith and credit clause](#) was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Id.* at 276-277.

In [Sovereign Camp v. Bolin](#), 305 U.S. 66, this Court unanimously approved the foregoing principles and authorities and applied them to a case that goes even beyond the issue presented by the instant case. In that case, Bolin joined a Missouri lodge of a fraternal benefit society incorporated in [***1706] Nebraska. His certificate of membership was delivered to him in Missouri, and he paid his dues and assessments in Missouri. He was over 43 when he joined the society in June, 1896. At that time, one of its by-laws provided that a member joining at an age greater than 43 was entitled to life membership without payment of further dues or assessments after his certificate had been outstanding 20 years. On his certificate were endorsed the words "Payments to cease after 20 years," and it stated that, if in good standing, he would be entitled to participate in the beneficial fund up to \$ 1,000 payable to his beneficiaries and to \$ 100 for placing a monument at his grave. He paid his dues and assessments [***1371] for the required 20 years but ceased doing so in July, 1916. Upon his death, his beneficiaries sued in a state court of Missouri to recover on his certificate. They were met by the defense that, in [Trapp v. Sovereign Camp of the Woodmen of the World](#), 102 Neb. 562, 168 N. W. 191, the Supreme Court of Nebraska, in 1918, in a representative [*619] suit binding all members, had held that the by-law of the society, which had purported to authorize the "payments to cease" certificates, was *ultra vires* and void. In the suit by Bolin's beneficiaries, the Supreme Court of Missouri then held that from 1889 to 1897, including the time when Bolin joined the society,

there had been no Missouri statute providing for the registration and filing of reports in Missouri by foreign fraternal benefit societies and that there had been no provision exempting them from the operation of the general insurance laws of Missouri. The Supreme Court of Missouri, accordingly, applied what it considered to be the Missouri law and public policy. On this basis, it disregarded the special status of the claim as one derived from the decedent's membership in a Nebraska fraternal benefit society and disregarded the Nebraska law, as interpreted by the Supreme Court of Nebraska, which had held the decedent's purported exemption from payments after 1916 to be *ultra vires* and void. The Missouri court treated his membership as a Missouri contract, subject to the general insurance laws of Missouri, interpreted his certificate as an ordinary Missouri contract, not *ultra vires* under the law of Missouri, and held the society liable upon it. This Court, however, reversed that judgment on the ground that, under the [full faith and credit clause](#), the Missouri courts were required to accept the Nebraska law as to the validity of the corporate by-law.

Mr. Justice Roberts, writing for the Court said:

"We hold that the judgment denied full faith and credit to the public acts, records, and judicial proceedings of the State of Nebraska.

". . . The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex [*620] and abiding relation and the rights of membership are governed by the law of the State of incorporation. Another State, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile.

. . . .

"The court below was not at liberty to disregard the fundamental law of the petitioner and turn a membership beneficiary certificate into an old line policy to be construed and enforced according to the law of the forum. The decision that the principle of *ultra vires*

²⁶ Citing also for comparison, [Royal Arcanum v. Green](#), 237 U.S. 531; [Hancock National Bank v. Farnum](#), 176 U.S. 640; [McDermott v. Woodhouse](#), 87 N. J. Eq. 615, 618, 619, 101 A. 375, 376; and for reference, [Canada Southern R. Co. v. Gebhard](#), 109 U.S. 527, 537-538; [Hawkins v. Glenn](#), 131 U.S. 319, 329; [Nashua Savings Bank v. Anglo-American Co.](#), 189 U.S. 221, 229-230; [Harrigan v. Bergdoll](#), 270 U.S. 560, 564.

contracts was to be applied as if the petitioner were a Missouri old line life insurance company was erroneous in the light of the decisions of this court which have uniformly held that the rights of members of such associations are governed by the definition [***1707] of the society's powers by the courts of its domicile.

....

"Under our uniform holdings the court below failed to give full faith and credit to the petitioner's charter embodied in the statutes of Nebraska as interpreted by its highest court." *Id.* at 75 (citing [Modern Woodmen v. Mixer, supra](#), and [Royal Arcanum v. Green, supra](#)), 78, 79.

This pronouncement as to the uniform holdings of this Court has not been repudiated or modified. In the present case, the decisions relied upon by the court below, in reaching a contrary result, deal with related but distinguishable situations.

In [Pink v. A. A. Highway Express, 314 U.S. 201](#), this Court, in a unanimous opinion written by Mr. Chief Justice Stone, held that the [full faith and credit clause](#) [**1372] does not apply to an action brought in the courts of Georgia [*621] to collect assessments against an alleged member of an insolvent mutual insurance company, according to the terms of his contract of membership, unless such membership first be proved. The Court, however, recognized that corporate procedure in conformity with the statutes of the state of incorporation is entitled to full faith and credit so far as the necessity and amount of the assessment of stockholders' liability is concerned, and said at pp. 207-208: "The like principle has been consistently applied to mutual insurance associations, where the fact that the policyholders were members was not contested," citing [Royal Arcanum v. Green, 237 U.S. 531](#); [Modern Woodmen v. Mixer, 267 U.S. 544](#). And further:

"Where a resident of one state has by stipulation or stock ownership become a member of a corporation or association of another, the state of his residence may have no such domestic interest in preventing him from fulfilling the obligations of membership as would admit of a restricted application of the [full faith and credit clause](#). But it does have a legitimate interest in determining whether its residents have assented to membership obligations sought to be imposed on them by extrastate law to which they are not otherwise subject." *Id.* at 210-211.

These recent references to the principle which is involved in the instant case constitute a significant recognition of its consistency with the decisions of this Court in related but distinguishable situations. The *Pink* case appropriately emphasized the distinction between, on the one hand, a sound local public policy which closely scrutinizes the proof of the entry into a certain relationship and, on the other hand, a local public policy which, in the face of the [full faith and credit clause](#), would seek to eliminate important terms from that relationship after it has been entered into.

[*622] Contemporaneously with this development of the policy of this Court, applying the [full faith and credit clause](#) in support of membership obligations in fraternal benefit societies, it has considered the same clause in several related situations. For example, it has applied it in requiring the Minnesota courts to recognize the obligation of members of the safety fund department of a Connecticut life insurance company to meet assessments levied upon them pursuant to a mutual assessment plan valid under the laws of Connecticut. *Hartford Life Ins. Co. v. Ibs, 237 U.S. 662*. This was a unanimous opinion written by Mr. Justice J. R. Lamar. In another unanimous opinion in *Hartford Life Ins. Co. v. Barber, 245 U.S. 146, at p. 150*, [***1708] Mr. Justice Holmes said, "The powers given by the Connecticut charter are entitled to the same credit elsewhere as the judgment of the Connecticut court. [Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531, 542](#)." See also, *John Hancock Ins. Co. v. Yates, 299 U.S. 178, 182-183*.

Without reliance upon the [full faith and credit clause](#), a somewhat similar result has been recognized in the protective effect of the [Fourteenth Amendment of the Constitution of the United States](#), prohibiting the deprivation of any person of his property without due process of law. A like policy underlies § 10 of Article I of the Constitution, prohibiting a state from passing any law impairing the obligation of contracts. Accordingly, in *Home Ins. Co. v. Dick, 281 U.S. 397*, in an opinion by Mr. Justice Brandeis, this Court relied upon the [Fourteenth Amendment](#) in dealing with ordinary insurance policies. It upheld unanimously the effectiveness of a contractual one-year limitation upon the right to sue for recovery of a loss under a marine fire insurance policy, where such limitation was good in Mexico (in which country the insurance was written and was to be performed), as against a two-year general [**1373] statute of limitations of the state of [*623] the forum (Texas). In *Hartford Accident & Indemnity Co. v.*

[Delta & Pine Land Co., 292 U.S. 143](#), in an opinion by Mr. Justice Roberts, the Court again relied upon the [Fourteenth Amendment](#). There it upheld unanimously a 15-month contractual limitation upon the right to sue upon a fidelity bond. This limitation was valid in Tennessee, where such bond was entered into, and it was here upheld against the local policy of the state of the forum (Mississippi).

In a related but readily distinguishable series of cases dealing with conflicting claims arising under Workmen's Compensation Acts, emphasis has been placed upon the rule stated by Mr. Justice Stone, for a unanimous Court, in [Alaska Packers Assn. v. Comm'n, 294 U.S. 532, 547](#). He there said:

"... the conflict is to be resolved, not by giving automatic effect to the [full faith and credit clause](#), compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."

In [Pacific Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493](#), again speaking for the Court, he added at p. 502:

"And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the [full faith and credit clause](#) does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."

[*624] See also, [Magnolia Petroleum Co. v. Hunt, 320 U.S. 430](#), in which, as Chief Justice, he upheld the controlling effect of the [full faith and credit clause](#) as against the law of the forum.

The language quoted from the [Pacific Ins. Co.](#) case, *supra*, also was quoted with approval in [Williams v. North Carolina, 317 U.S. 287, at p. 296](#). In the latter case, on the basis of the [full faith and credit clause](#), this Court gave effect to the law of the domicile in upholding the validity of a [*1709] divorce, as against the law of the forum.

We find no conflict between the position taken in the instant case and that taken in the foregoing cases or in

[Griffin v. McCoach, 313 U.S. 498](#), [Hoopeson Co. v. Cullen, 318 U.S. 313](#), or in other decisions of this Court upon which reliance has been placed to support an opposite conclusion.

Accepting the view, expressed in these related cases, that this Court should not give what Mr. Justice Stone called a mere "automatic effect to the [full faith and credit clause](#),"²⁷ **HN5** this Court consistently has upheld, on the basis of evaluated public policy, the law of the state of incorporation of a fraternal benefit society as the law that should control the validity of the terms of membership in that corporation. The weight of public policy behind the general statute of South Dakota, which seeks to avoid certain provisions in ordinary contracts, does not equal that which makes necessary the recognition of the same terms of membership for members of fraternal benefit societies wherever their beneficiaries may be. This is especially obvious where the state of the forum, with full information as to those terms of membership, has permitted such societies to do business and secure members within its borders. There would be little sound public policy in permitting the courts of South Dakota to recognize an action to collect [*625] the full benefits to be derived from a membership in the petitioner society, while, at [*1374] the same time, nullifying other integral terms of that same membership which limit certain rights of beneficiaries to enforce collection of such benefits. **HN6** It is of the essence of the [full faith and credit clause](#) that, if a state gives *some* faith and credit to the public acts of another state by permitting its own citizens to become members of, and benefit from, fraternal benefit societies organized by such other state, then it must give *full* faith and credit to those public acts and must recognize the burdens and limitations which are inherent in such memberships. In this case, the state of the forum has licensed the society to do business within its borders. It is concerned as much with the validity and fairness of the obligations to be enforced by assessments against its citizens who become members of the society as it is with the benefits to be claimed by those who become its beneficiaries. In this case, the [full faith and credit clause](#), therefore, requires that effect be given to the six-month limit, prescribed by the society and authorized by Ohio, upon the right to commence this action. Such limit expired before this action was commenced and the judgment of the Supreme Court of South Dakota in favor of the respondent accordingly is

Reversed.

²⁷ [Alaska Packers Assn. v. Comm'n, supra, at p. 547.](#)

Dissent by: BLACK

Dissent

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE join, dissenting.

The *Order of United Commercial Travelers* is a corporation chartered under the laws of Ohio with power to do a fraternal insurance business. It sells contracts of insurance in Ohio. South Dakota has licensed the corporation to sell fraternal insurance policies in that state. Under this permission, the corporation has an office, called a local council, in Black Hills, South Dakota, vested with [*626] power to administer "the business and fraternal affairs of the *Order*."

The insured, a citizen and resident of South Dakota, applied to the Black Hills office for membership and an insurance policy. After the application had been accepted and an insurance certificate signed at the petitioner's home office in Ohio, it was "forwarded by the said Defendant corporation to South Dakota for delivery [***1710] to the insured." From then until his death in South Dakota, the insured paid his premiums to the corporation's Black Hills office. During all that period his beneficiary lived in that state. This action was brought in a court of that state on behalf of the beneficiary after the corporation had refused to pay the claim.

The association denied liability because this suit had not been commenced within six months after the association had disallowed the beneficiary's claim. This is required by the corporation's constitution which is incorporated by reference into its contracts of insurance. And in a series of cases, cited in the Court's opinion, the Supreme Court of Ohio has held that suits brought in Ohio courts on mutual, stock company, or fraternal insurance contracts, may be barred by contractual arrangements between the parties which require that suit be brought within a shorter period than that provided by the Ohio limitations statutes.

But the South Dakota Supreme Court has held that a statute of that state which provides that "every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void," S. D. Code § 10.0705 (1939), renders the limitation provision in this

contract unenforceable in her courts. This Court today reverses the South Dakota decision on the ground that its refusal to enforce the private contract is a denial of full faith and credit to the "public Acts, Records, and judicial Proceedings" of Ohio. [U.S. Const., Art. IV, § 1.](#)

[*627] *First.* More than one hundred years ago this Court said that to require a state to apply the "limitation laws" of another state rather than its own would reduce it "to a state of vassalage," presenting the anomaly "of a sovereign state governed by the laws of another sovereign." *Hawkins v. Barney's Lessee*, 5 Pet. 457, 466-467. A few years later the Court was asked to hold that the [full faith and credit clause](#) barred a state from applying its own statute of limitations in a suit brought on a cause of action which had arisen in another state. On that question the Court did not "entertain a doubt"; the holding was that it could not "be even plausibly inferred" that the state in which the suit was brought was denied that power by the [full faith and credit clause](#). *M'Elmoyle v. Cohen*, 13 Pet. 312, 324, 328. While the case then under consideration involved a suit on a judgment rendered in another state, the broad ruling was that, so far as the [full faith and credit clause](#) is concerned, a state has power to apply its own statute of limitations in every kind of action and without regard to where the cause of action arose.

The constitutional force of the *M'Elmoyle* refusal to require a forum state to give full faith and credit to a foreign state's statute of limitations is not weakened in the slightest by the fact that some states have seen fit to adopt "borrowing statutes." See *Cope v. Anderson*, *ante*, p. 461, at note 3. For other states, notably South Dakota here, have adopted statutes with purposes quite opposite to that of borrowing statutes. And under the *M'Elmoyle* rule, whichever limitations policy a forum state chooses to follow -- to borrow or to refuse to borrow -- it is free, so far as the [full faith and credit clause](#) is concerned, to do so.

The plain effect of today's decision is to overrule the *M'Elmoyle* case. And it does so, despite the fact that the holding of that case has never before been cited with disapproval; in fact, that holding has been repeatedly [*628] approved and reaffirmed throughout the years

since it was decided.¹ The Court [***1711] distinguishes the *M'Elmoyle* rule, and in fact relies generally for its decision upon the line of decisions in which [Modern Woodmen of America v. Mixer, 267 U.S. 544](#), is the leading case. But the statute of limitations was not in issue in the *Mixer* case, the case on which it relied, or the cases which have since relied on it. The *M'Elmoyle* case was not even cited in the Court's *Mixer* opinion; nor does anything said in it detract from the rule of the *M'Elmoyle* case that states can, despite the [full faith and credit clause](#), apply their own statutes of limitation.² Yet the Court now treats the *Mixer* case as controlling, [**1376] and holds that the [full faith and credit \[*629\] clause](#) deprives South Dakota of power to apply its own statute of limitations.³

But more than that, the "state of vassalage" to which the Court's decision here reduces South Dakota is not even in subordination to the laws of another state. The Court's opinion means that South Dakota must yield to a "law" adopted by the members of an Ohio-created private fraternal insurance association. That "law," appearing only in the private association's constitution, provides in the same kind of language that legislatures ordinarily use in their statutes of limitation that "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date of the claim for said benefits is disallowed by the Supreme Executive Committee."

The nearest that this private association's "law" comes to being a law of Ohio is that Ohio permits but does not

require it. Because the private association's constitution was incorporated by reference in the policy contract, including the constitution's "statute of limitations, [***1712] " the Court now holds that this corporate "statute of limitations" prohibits application of South Dakota's statute of limitations. Thus the Court's holding is that an Ohio [*630] private corporation's laws have a higher constitutional standing than an Ohio law or judgment would have -- unless, as seems to be true, *M'Elmoyle v. Cohen, supra*, and subsequent cases approving it are now being overruled. It would be quite a radical departure from this Court's previous authorities to hold that the [full faith and credit clause](#) bars a government from applying its own statutes of limitations to suits brought in its courts, a power which, this Court said in its *M'Elmoyle* decision, governments have exercised since remote antiquity. *Id.* at 327. It is a far greater departure to hold that a state's limitation statute must take second place to the limitations rules adopted by a privately operated corporation.

It should come as quite a surprise to Ohio that its state policy can supplant South Dakota's statute of limitations, since Ohio's highest Court follows the *M'Elmoyle* rule that "Statutes of limitation relate to the remedy, and are, and must be, governed by the law of the forum; for it is conceded, that a court which has power to say when its doors shall be opened, has also power to say when they shall be closed." [Kerper v. Wood, 48 Ohio St. 613, 622, 29 N. E. 501, 502](#). And the principle there announced was followed by the Ohio Supreme Court as late as

¹ [Townsend v. Jemison, 9 How. 407, 410](#); [Bank of Alabama v. Dalton, 9 How. 522, 528](#); [Bacon v. Howard, 20 How. 22, 25](#); [Christmas v. Russell, 5 Wall. 290, 300](#); [Amy v. Dubuque, 98 U.S. 470, 471](#); [Campbell v. Holt, 115 U.S. 620, 626](#); [Campbell v. Haverhill, 155 U.S. 610, 618](#). See also [Chase Securities Corp. v. Donaldson, 325 U.S. 304](#); [Michigan Ins. Bank v. Eldred, 130 U.S. 693](#); [Bank of United States v. Donnally, 8 Pet. 361](#); [M'Cluney v. Silliman, 3 Pet. 270](#).

² The Court also refers to [Hartford A. & I. Co. v. Delta & Pine Land Co., 292 U.S. 143](#), and [Home Ins. Co. v. Dick, 281 U.S. 397](#). The Court does not rest its decision on the due process clause. But the decisions in those cases went on the due process clause, and, far from supporting the holdings here, are actually inconsistent with it. If they are to be followed they stand for the propositions that a state which has no interest at all, or only a minor interest, in the transaction sued on cannot, because of the mere accident of supplying the judicial forum, apply its own statute of limitations so as to defeat the terms of a contract valid in the jurisdiction where the obligation was initiated, negotiated, and completed. The two cases cast considerable doubt on Ohio's power to have applied its limitation statute had this suit been filed there; conversely, they provide rather persuasive argument to support a contention that South Dakota's statute should control liability here in view of that state's considerable interest, even beyond that of providing the forum of this action.

³ The Court takes the view that it is well established that a contract provision limiting the time within which suit can be brought may override a state's statute of limitations providing a longer period. For this proposition it cites [Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386](#). That case came from a Federal Circuit Court in Missouri where the sole problem posed or decided was whether under Missouri law or general federal law a contract limitation violated the policy of Missouri expressed in its statute of limitations. But see [Guaranty Trust Co. v. York, 326 U.S. 99](#). There was no full faith and credit question, due process question, or any other constitutional question. *M'Elmoyle v. Cohen, supra*, was not cited in the *Riddlesbarger* case. Nor was it relevant because no foreign law was put forward which might require Missouri to give full faith and credit to it.

1943. [Payne v. Kirchwehm](#), 141 Ohio St. 384, 48 N. E. 2d 224; cf. [Cope v. Anderson](#), ante, p. 461.

Second. Leaving aside the *sui generis* features of a forum state's power over limitations of actions in its courts, the present holding violates other established rules concerning a state's power to govern its own local affairs and to protect from overreaching contracts persons in whom the state has a legitimate interest. See [Griffin v. McCoach](#), 313 U.S. 498; [Pink v. A. A. A. Highway Express](#), 314 U.S. 201. I had considered it well settled that if an insurance company does business at all in a state, its contracts are "subject [**1377] to such valid regulations as the [*631] State may choose to adopt." See [Whitfield v. Aetna Life Ins. Co.](#), 205 U.S. 489, 495; [Knights Templars' & Masons' Life Indemnity Co. v. Jarman](#), 187 U.S. 197, 202; [Hancock Mutual Life Ins. Co. v. Warren](#), 181 U.S. 73, 75. This conception of broad state power has not been limited to particular kinds of laws or particular kinds of contracts of special kinds of insurance companies. Thus in regard to a mutual insurance company, the Court has held the terms of a policy governed by the law of Missouri where the contract was made in the face of a contract stipulation that they were to be governed by the laws of New York, the mutual company's domicil. [New York Life Ins. Co. v. Cravens](#), 178 U.S. 389. For this Court concluded from inferences it found in the Missouri Court's opinion that compliance with Missouri law "was a condition upon the right of insurance companies to do business in the State." [Id. at 395](#). It further held that Missouri had the same continuing power to regulate the business contracts of a foreign corporation permitted to do business there as it had over the contracts of domestic corporations. [Id. at 400-401](#). And when a foreign building and loan association which did business with its members only ⁴ sought to [***1713] avoid Mississippi usury laws by specifying that a loan contract with a Mississippi member was made in New York where the interest charged was not usurious, this Court held that Mississippi law governed and voided the contract. [National Mutual Bldg. & Loan Assn. v. Brahan](#), 193 U.S. 635. The Court approved the conclusion of the

Supreme Court of Mississippi that the association, by qualifying to do business in Mississippi, "had become 'localized' in the State, had accepted the laws of the State [*632] as a condition of doing business there, and could not, nor could [the Mississippi member] 'abrogate by attempted contract stipulations' those laws. See [Hancock Mutual Life Ins. Co. v. Warren](#), 181 U.S. 73." [Id. at 650](#). Because the contract was thus controlled by Mississippi rather than New York law, the Court held that "there is no foundation for the contention that full faith and credit were not given to the public acts and records of New York." [Id. at 647](#).

The Court's opinion in the present case is apparently inconsistent with the foregoing cases which have established that state courts have a continuing authority to execute the public policy of the state by refusing to enforce contract provisions of foreign corporations permitted by the state to do business there -- even though those corporations do business with members only. Today's opinion does imply, however, that South Dakota officials could have excluded this corporation from doing business in the state or could have revoked its license upon discovery of the foreign corporation's violation of the laws of the state. I cannot believe that the [full faith and credit clause](#) stays the hands of the state courts as instruments of state power in private litigation any more than it could forestall state authorities from revoking the association's license for persisting in making unlawful contracts.

Third. Another handle of South Dakota's power over this corporation derives, not from the corporation's acceptance of South Dakota law as a continuing condition of doing business, but from the number and importance of the incidents involved in the making and the performance of the specific contract here which occurred in South Dakota. Unless the Court's [**1378] decision overrules ⁵ the long [*633] line of cases cited in the margin ⁶ this insurance contract was "made" and to be performed in South Dakota, and its validity is governed by the law of that state. Thus in [Hartford A. & I. Co. v. Delta & Pine Land Co.](#), 292 U.S. 143, 150,

⁴ "The purpose of the Association is to make loans only to its members, and for the further purpose of accumulating a fund to be returned to its members who do not receive advances on their shares." [National Mutual Bldg. & Loan Assn. v. Brahan](#), 193 U.S. 635, 636.

⁵ The Court purports not to overrule these cases for it states: ". . . We do not rely upon the place of concluding the contract of membership or upon the place prescribed for its performance."

⁶ [Hoopston Canning Co. v. Cullen](#), 318 U.S. 313; [Osborn v. Ozlin](#), 310 U.S. 53; [Mutual Life Ins. Co. v. Johnson](#), 293 U.S. 335, 339; [Northwestern Mutual Life Ins. Co. v. McCue](#), 223 U.S. 234, 246-248; [Whitfield v. Aetna Life Ins. Co.](#), supra, 495; [Knights Templars' & Masons' Life Indemnity Co. v. Jarman](#), supra; [Chattanooga National Bldg. & Loan Assn. v. Denson](#), 189

Mississippi was required to enforce an insurance contract, unlawful in that state, although both the parties did business there, and although the suit on the contract was brought there, because the contract was valid in Tennessee, the state where the contract was held to [***1714] have been made and which had the major connection with the whole transaction. For, said the Court, Mississippi "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made." *Id. at 149*.

Before today, contentions that the *full faith and credit clause* overcomes the power of a state over a contract made and operative there have been flatly rejected by this Court. Thus in *American Fire Ins. Co. v. King Lbr. & Mfg. Co.*, 250 U.S. 2, an insurance company was authorized by Pennsylvania, the state of its incorporation, to write fire insurance on property outside that state. It was not licensed to do business by Florida, but accepted insurance applications through independent brokers there. Under the law of Pennsylvania where the applications were accepted and the policies written, brokers were apparently not authorized to waive contract [*634] provisions. But under Florida law the brokers were deemed agents of the Pennsylvania company with power to bind it by waivers. In answer to the contention that the Florida ruling denied full faith and credit to the law of Pennsylvania, this Court said that the case does not

". . . present an attempt of the Florida law to intrude itself into . . . Pennsylvania and control transactions there; it presents simply a Pennsylvania corporation having the permission of that State to underwrite policies on property outside of the State and the exercise of the right in Florida. And necessarily it had to be exercised in accordance with the laws of Florida. There was no law of Pennsylvania to the contrary -- no law of Pennsylvania would have power to the contrary. There is no foundation, therefore, for the contention that full faith was not given to a law of Pennsylvania . . ." *Id. at 10*.

Fourth. In interpreting the *full faith and credit clause* this Court has repeatedly insisted that it would weigh all the interests of each state involved before holding that the

full faith and credit clause qualified one state's power to govern its own affairs. See *Pink v. A. A. Highway Express, supra*, 210-211, and cases there cited; *Magnolia Petroleum Company v. Hunt*, 320 U.S. 430, 436-437. I have recited the many bases for South Dakota's legitimate interest. What is the interest of Ohio to which the Court holds South Dakota must give full faith and credit?

[**1379] It may be that the Court's view is that Ohio has an interest in securing uniformity of rights and obligations among all the policyholder-members throughout the country. For, says the Court, "If full faith and credit are not given . . . , the mutual rights and obligations of the members of such societies are left subject to the control of each state. They become unpredictable and almost inevitably unequal."

[*635] It is true that in situations involving the liability of stockholders for assessment obligations imposed by a corporate charter or the laws of a chartering state, the assessment obligation has been held to be governed by the laws of the chartering state. *Converse v. Hamilton*, 224 U.S. 243; *Broderick v. Rosner*, 294 U.S. 629. And assessments against fraternal as well as mutual insurance policyholders based on ownership rights and obligations which their insurance policies, like stock holdings, represent, have been similarly held to be controlled by the law of the state of the corporation's domicil. *Royal Arcanum v. Green*, 237 U.S. 531; [***1715] *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146; *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662. For insofar as a mutual or fraternal insurance policyholder assumes the assessment obligation which a stockholder may bear in other companies, he underwrites the risk that the corporation of which he is an owner might become insolvent. And that insolvency, particularly of an insurance company, would occur and generally become a responsibility of the chartering state where the principal business is conducted. The contingency of insolvency has been thought to give the chartering state greater and more direct interest in the extra-territorial collection of assessments against stockholders of corporations, than a state has in the day-to-day business transactions in which a corporation chartered by it engages in other states.⁷

[*636] This line of distinction has been clearly marked by the contrary result this Court has reached in cases

U.S. 408; *National Bldg. & Loan Assn. v. Brahan, supra*; *Wall v. Equitable Life Assur. Soc.*, 32 F. 273, affirmed *sub nom. Equitable Life Society v. Clements*, 140 U.S. 226.

⁷ This contrast is dramatized by the consequences to Ohio's interest in the injury which would flow from South Dakota's disregard for this contract limitation which violates South Dakota's public policy. It is certainly a tenuous thread which would link

concerning day-to-day business contracts made by foreign non-fraternal mutual insurance and membership loan companies with their policyholders and member-borrowers. In *New York Life Ins. Co. v. Craven*, [supra](#), at 400, it was urged that the fact that the mutual insurance company there was "the administrator of a fund collected from the policy holders in different States and countries for their benefit," demonstrated "the necessity of a uniform law to be stipulated by the parties exempt from the interference or the prohibition of the State where the insurance company is doing business." This contention was emphatically rejected. And in *National Mutual Bldg. & Loan Assn. v. Brahan*, [supra](#), 636, 650, this Court, placing considerable reliance upon its previous *Craven* decision, held that contracts of a membership loan association whose controlling and central purpose, like the distinguishing "feature" relied upon by the Court here, was "to make loans only to its members, and for . . . accumulating a fund to be returned to its members," were, despite the [full faith and credit clause](#), subject to the law of a state in which the association was doing business as a foreign corporation.

It seems apparent from these authorities that Ohio's interest in uniform administration of a corporation's contract obligations [***1380**] for the funds of a company created under its laws is not entitled to full faith and credit merely because of the communal interest of policyholder-members in that fund. And the fact, so heavily stressed by the Court, that the corporation was incorporated under the laws of Ohio so that its continued existence depends upon that law is plainly insufficient basis for a contention that, therefore, Ohio's interest demands full faith and credit for this contract provision.

[***637**] Actually, it is not Ohio's interest in the uniform administration of the company's funds to which the Court gives full faith and credit. For otherwise, I should think, the opinion would cite and distinguish these cases which establish that this interest is not one entitled to full faith and credit. It is the limitations "law" of the corporate constitution enacted [*****1716**] to protect its own interest, not the statutes of Ohio, which are held to bar this suit because it was not filed within six months. Thus it seems manifest that the Court is giving full faith and credit to the "laws" and the interest of the Ohio corporation. And the Court does this on the theory that

the fraternal corporation's constitution which governs the terms of its contracts is "subject to amendment through the processes of a representative form of government authorized by the law of the state of incorporation." Apparently, it is felt that the individual South Dakota policyholder-member can protect himself from overreaching contracts within the framework of this "representative" intracorporate government which is subject to whatever regulation Ohio chooses to impose. Until today I had never conceived of the Federal Constitution as requiring the forty-eight states to give full faith and credit to the laws of private corporations on the theory that a policyholder-member's ability to protect himself through intra-corporate politics makes state protection of him unnecessary and unconstitutional. It is a naive assumption that a policyholder-member of a fraternal corporation like this does not need protection from his state. Moreover, if valid, this assumption would apply with equal logic to immunize these fraternal corporations from the laws of their domiciles.

The conclusion reached by the Court that fraternal insurance companies are entitled to unique constitutional protection is not justified by the language of the Constitution nor by the nature of their enterprise. And our [***638**] previous decisions concerning fraternal insurance companies do not support the conclusion which the Court draws from the superficial distinguishing characteristics which these companies possess.

As I have pointed out, those cases which hold that assessments against fraternal policyholders in their capacity as stockholders are governed by the law of the company's domicil, have no relation to a fraternal company's obligation to a beneficiary of an insurance contract. Moreover, in *Sovereign Camp W. O. W. v. Bolin*, [305 U.S. 66](#), heavily relied on by the Court, the fraternal association was freed from liability in a state in which it was not authorized to do business because a judgment of the highest court of the state which had chartered the association had declared, in a class suit to which the claimant had been, in effect, a party, that the policy sued on had been issued *ultra vires*. Thus the *Bolin* case is merely a familiar example of enforcement of *res judicata* under the [full faith and credit clause](#). A judgment of any state, whether chartering state or not, would be entitled to the same respect. Here, of course,

South Dakota's refusal to enforce this and similar limitations to the undue depletion of the corporate funds. For it is unlikely that in calculating rates and risks, actuaries took into account the chance that the company might escape paying just claims because of company-imposed limitations on the time for bringing suit. On the other hand recovery of insurance claims often saves insurance beneficiaries from becoming public charges of the state of their residence.

there is no judgment to which the claimant was a party which is entitled to full faith and credit. And the power of the Ohio corporation, so far as Ohio law is concerned, to make a contract consistent with South Dakota policy is unquestioned.

The other case relied on heavily by this Court is [Modern Woodmen of America v. Mixer, supra](#). In that case Mixer, the beneficiary, lived in Nebraska. While the record was not wholly clear, the insured had apparently previously lived in South Dakota, and the certificate seems to have been "issued" there. A by-law of the Woodmen, an Illinois association, provided that its **[**1381]** certificate should insure against death but that "long continued absence of any member unheard of shall not . . . give any right to recover on any benefit certificate." **[*639]** Nebraska, where Mixer brought the suit, but in which state the contract had not been made, had a rule of evidence that a presumption of death arises from seven years unexplained absence. Apparently considering the by-law "unreasonable," the Supreme Court of Nebraska enforced **[***1717]** its long-continued absence rule of evidence and held the association liable. The Supreme Court of Illinois, where the association was chartered, had held the by-law reasonable in that it merely showed a purpose of the association to limit its insurance to death rather than to extend it to long-continued absences. [Steen v. Modern Woodmen of America, 296 Ill. 104, 129 N. E. 546](#). It was on this record that this Court reversed the Nebraska court's decision in the *Mixer* case.

This reversal can be justified on the facts of the *Mixer* case, which are clearly different from the facts in the case before us. There was no conflict in *Mixer* between the policy of the state where the contract was made, and Illinois, the state of the association's domicile. For the contract apparently had been made in a third state, South Dakota, consistently with the laws of that state. Nor does it appear from the record of that case that the association had been licensed to do business so as to accept either the law of the state where the contract was made, or that of Nebraska where the suit was brought. Finally, as I have already indicated, no statute of limitations was involved in the *Mixer* case.

But it is said that language of the *Mixer* case means that the obligations of a fraternal insurance corporation are to be governed by the law of its domicile. If this language means that such an association is privileged to live above the law of the state where it does business, makes contracts, and is sued, I think that language

should be repudiated. The purported differences between fraternal insurance companies and other reciprocal, co-operative **[*640]** and mutual insurers, are too fragmentary and inconsequential to justify any Constitutional difference in treatment. *Cf. Hoopeston Canning Co. v. Cullen, 318 U.S. 313*.

Neither in the *Mixer* case nor in the present one does the Court attempt to demonstrate, and I seriously question that a demonstration is possible, that the insurance business of a fraternal company is conducted differently in any important way from that of a mutual, reciprocal, or joint stock company. The insurance phase of this company is set apart from the fraternal phase after election to membership, even though payment of assessments levied for insurance purposes is made compulsory. The provisions of its constitution show that insurance terms and conditions are precisely like those of non-fraternal companies. Insurance funds are administered on a business basis, and they cannot be used for fraternal purposes. In short, the insurance program and activities reveal that this is an insurance company, run like other insurance companies. The only non-paper difference is that insurance is sold only to members of the fraternity.

Nor is it apparent to me that an individual policyholder-member in a remote community exercises any significant influence on the technical insurance aspects of a fraternal company's business. Certainly, he can no more control the policy contract provisions than could a mutual policyholder or a member of a membership loan association. And the individual member would share as much and no more in the fraternal company's gains from overreaching contracts as would participants in these indistinguishable associations.

That fraternal-order insurance businesses such as petitioner's are of a magnitude to move each state to regulate them so as to protect its citizens can hardly be doubted. The best information obtainable shows that in 1944 fraternal **[*641]** life insurance businesses in the United States had aggregate assets of almost \$ 1,500,000,000; income of \$ 255,600,000; \$ 6,794,300,000 insurance in **[**1382]** force; and 7,582,000 outstanding certificates. During 1944 they

spent \$ 43,300,000 for agents and management. ⁸
 [***1718] There is, thus, every reason for giving the same force and effect to state regulation of fraternal insurance companies as is given regulation of all other insurance businesses.

Fifth. I fear that it may be significant that the Court has conspicuously refrained from stating in unmistakable terms that its new doctrine applies only to fraternal insurance companies. If, as the Court holds, the interest of Ohio or of its corporate creature does outweigh the interest of every state in which that creature does business, I see no sound basis in the facts or in the authorities cited by the Court for declining to apply this formula to almost every type of business corporation created in one state and doing business in another.

The effect of such a doctrine on the rights of states to govern themselves is graphically demonstrated by the insurance business. The five largest legal reserve life insurance companies in the United States, with total assets of approximately \$ 15,000,000,000, have their home offices in or near New York and Connecticut. [United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 541.](#) The result of the Court's opinion, if later carried to its logical conclusion, would be that the policy obligations of all of these companies, in whatever

state assumed, would be governed by New York or Connecticut law or that of nearby states, and that all of the other states would be deprived of power to pass legislation believed by them to be necessary to protect their own citizens against unconscionable [*642] contracts. By permitting its insurance corporations, particularly mutual companies, to make contracts barring an insured's access to state courts, New York, for example, could thus render all the other states helpless to provide a judicial haven for their own wronged citizens.

Such a doctrine is not only novel; it is revolutionary. I think the doctrine violates the very Constitution that it is our duty to interpret. For the Court today, in part, nullifies a great purpose of the original Constitution, as later expressed in the [Tenth Amendment](#), to leave the several states free to govern themselves in their domestic affairs. Hereafter, if today's doctrine should be carried to its logical end, the state in which the most powerful corporations are concentrated, or those corporations themselves, might well be able to pass laws which would govern contracts made by the people in all of the other states.

I would affirm this judgment.

⁸ Statistical Abstract of the United States, Dept. of Commerce, Bureau of the Census (1946) 442.

CORPORATIONS CODE

SECTION 5130-5134

5130. The articles of incorporation of a corporation formed under this part shall set forth:

- (a) The name of the corporation.
- (b) The following statement:

"This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for (public or charitable [insert one or both]) purposes."

[If the purposes include "public" purposes, the articles shall, and in all other cases the articles may, include a further description of the corporation's purposes.]

(c) The name and street address in this state of the corporation's initial agent for service of process in accordance with subdivision (b) of Section 6210.

(d) The initial street address of the corporation.

(e) The initial mailing address of the corporation, if different from the initial street address.

5131. The articles of incorporation may set forth a further statement limiting the purposes or powers of the corporation.

5132. (a) The articles of incorporation may set forth any or all of the following provisions, which shall not be effective unless expressly provided in the articles:

(1) A provision limiting the duration of the corporation's existence to a specified date.

(2) In the case of a subordinate corporation instituted or created under the authority of a head organization, a provision setting forth either or both of the following:

(A) That the subordinate corporation shall dissolve whenever its charter is surrendered to, taken away by, or revoked by the head organization granting it.

(B) That in the event of its dissolution pursuant to an article provision allowed by subparagraph (A) or in the event of its dissolution for any reason, any assets of the corporation after compliance with the applicable provisions of Chapters 15 (commencing with Section 6510), 16 (commencing with Section 6610) and 17 (commencing with Section 6710) shall be distributed to the head organization.

(b) Nothing contained in subdivision (a) shall affect the enforceability, as between the parties thereto, of any lawful agreement not otherwise contrary to public policy.

(c) The articles of incorporation may set forth any or all of the following provisions:

(1) The names and addresses of the persons appointed to act as initial directors.

(2) The classes of members, if any, and if there are two or more classes, the rights, privileges, preferences, restrictions and conditions attaching to each class.

(3) A provision that would allow any member to have more or less than one vote in any election or other matter presented to the members for a vote.

(4) A provision that requires an amendment to the articles, as provided in subdivision (a) of Section 5812, or to the bylaws, and any amendment or repeal of that amendment, to be approved in writing by a specified person or persons other than the board or the members. However, this approval requirement, unless the articles specify otherwise, shall not apply if any of the following circumstances exist:

(A) The specified person or persons have died or ceased to exist.

(B) If the right of the specified person or persons to approve is in the capacity of an officer, trustee, or other status and the office, trust, or status has ceased to exist.

(C) If the corporation has a specific proposal for amendment or repeal, and the corporation has provided written notice of that proposal, including a copy of the proposal, to the specified person or persons at the most recent address for each of them, based on the corporation's records, and the corporation has not received written approval or nonapproval within the period specified in the notice, which shall not be less than 10 nor more than 30 days commencing at least 20 days after the notice has been provided.

(5) Any other provision, not in conflict with law, for the management of the activities and for the conduct of the affairs of the corporation, including any provision that is required or permitted by this part to be stated in the bylaws.

5133. For all purposes other than an action in the nature of quo warranto, a copy of the articles of a corporation duly certified by the Secretary of State is conclusive evidence of the formation of the corporation and prima facie evidence of its corporate existence.

5134. If initial directors have not been named in the articles, the incorporator or incorporators, until the directors are elected, may do whatever is necessary and proper to perfect the organization of the corporation, including the adoption and amendment of bylaws of the corporation and the election of directors and officers.

▲ Caution
As of: October 12, 2015 11:42 AM EDT

Supreme Council of Royal Arcanum v. Green

Supreme Court of the United States

Argued December 8, 9, 1914. ; June 1, 1915, Decided

No. 106.

Reporter

237 U.S. 531; 35 S. Ct. 724; 59 L. Ed. 1089; 1915 U.S. LEXIS 1362

SUPREME COUNCIL OF THE ROYAL ARCANUM v. GREEN.

Prior History: ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

THE facts, which involve the effect and application of the [full faith and credit clause of the Federal Constitution](#) and other matters, are stated in the opinion.

Core Terms

by-laws, certificate, charter, full faith and credit, contractual right, assessments, powers, rates, certificate holder, state law, ascertaining, Orphans', rights, Lodge, benefit fund, trial court, subscription, conferred, fraternal, exacting, parties

Case Summary

Procedural Posture

Plaintiff in error sought review of a decision of the Supreme Court of the State of New York that defendant in error was entitled to compensation for rate increases which violated corporation by-laws and state law.

Overview

Plaintiff in error corporation was organized under the laws of Massachusetts. Defendant in error was a member of a branch of the corporation in New York. Over a number of years, the corporation voted certain dues increases. One increase was taken to court by the members in Massachusetts, and the increase was held valid. Defendant in error later ceased to make his payments and brought suit against the corporation in New York for the same increase already litigated. A decision that the law of New York governed and defendant in error was entitled to relief was reversed

and remanded. As the charter was a Massachusetts charter and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that state, those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws. Under the [Full Faith and Credit Clause](#), the amendment to the by-laws was valid under the applicable Massachusetts law.

Outcome

The Court reversed and remanded because the controlling law under the [Full Faith and Credit Clause](#) was the law of state of the prior litigation. Under that law, the increase was valid.

LexisNexis® Headnotes

Business & Corporate Law > Corporations > Corporate Finance > General Overview

Business & Corporate Law > ... > Corporate Finance > Initial Capitalization & Stock Subscriptions > General Overview

Business & Corporate Law > ... > Corporate Formation > Place of Incorporation > General Overview

HN1 The law of the State by which a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make. The state law and proceedings are binding as to the ascertaining of the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected.

Bankruptcy Law > Procedural Matters > State Insolvency Laws

Business & Corporate Law > Corporations > Corporate Finance > General Overview

Business & Corporate Law > ... > Corporate Finance > Initial Capitalization & Stock Subscriptions > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

HN2 Putting out of view the right of the person against whom a liability for a stockholder's subscription is asserted to show that he is not a stockholder, or is not the holder of as many shares as is alleged, or has claim against the corporation which at law or equity he is entitled to set off against the corporation, or has any other defense personal to himself, a decree against the corporation in a suit brought against it under the state law for the purpose of ascertaining its insolvency, compelling its liquidation, collecting sums due by stockholders for subscriptions to stock and paying the debts of the corporation, in so far as it determines these general matters, binds the stockholder, although he be not a party in a personal sense, because by virtue of his subscription to stock there was conferred on the corporation the authority to stand in judgment for the subscriber as to such general questions.

Lawyers' Edition Display

Headnotes

Error to state court -- Federal question -- full faith and credit -- how raised. --

Headnote:

A question under the [full faith and credit clause of the Federal Constitution](#) as to the effect to be given to the law of another state was sufficiently raised to support a writ of error from the Federal Supreme Court to review a judgment of a New York court holding that the law of New York governs the respective rights of a Massachusetts mutual benefit society and the members of a New York subordinate council, although there was no specific reference to the [full faith and credit clause](#) in the repeated assertions in the pleadings that the society was incorporated in Massachusetts, and that the laws of that state controlled the operation and effect of its charter, where a Massachusetts judgment construing such charter was expressly pleaded, accompanied with an explicit averment that not to give it due effect would be a violation of the [full faith and credit clause](#), and the

due effect to be given such judgment depends upon whether or not the Massachusetts law controlled the parties.

[For other cases, see Appeal and Error, 1168-1248, in Digest Sup. Ct. 1908.]

Statutes -- full faith and credit -- powers of mutual benefit society -- increasing rates. --

Headnote:

A violation of the [full faith and credit clause of U. S. Const. art. 4, 1](#), results from the refusal of the New York courts to hold that the power of a Massachusetts mutual benefit society under its charter and by-laws so to amend such bylaws as to increase its assessment rates, and the rights and duties of the members of a New York subordinate council with respect to such increase, are to be determined by the Massachusetts law, under which, as construed by a judgment of the highest court of that state, such amendment is valid and violates no contract rights of the certificate holder.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1909 Supp.]

Judgment -- of sister state -- full faith and credit. --

Headnote:

The full faith and credit due from the New York courts under [U. S. Const. art. 4, 1](#), to a Massachusetts judgment, which holds that a mutual benefit society incorporated in that state has the power under its charter and by-laws to increase its assessment rates, requires that the courts of the former state, when called upon to consider the validity of such increase as to members of a New York subordinate council, recognize the controlling effect of the Massachusetts law as established by that judgment.

[For other cases, see Judgment, VI. b, in Digest Sup. Ct. 1908.]

Appeal -- briefs of counsel -- striking from files -- improper language. --

Headnote:

Counsel's brief will be stricken from the files where it is full of vituperative, unwarranted, and impertinent expressions as to opposing counsel.

[For other cases, see Appeal and Error, V. u, in Digest Sup. Ct. 1908.]

Syllabus

Where the trial court refuses to hold that the rights of the parties were to be determined by the law of another State in which a decree had been rendered establishing them and to apply such law, it refuses to give due effect to such decree, and a question arises under the [full faith and credit clause of the Federal Constitution](#) and this court has jurisdiction under § 237, Judicial Code.

The rights of members of a corporation of a fraternal and beneficiary character have their source in the constitution and by-laws of the corporation, and can only be determined by resort thereto, and such constitution and by-laws must necessarily be construed by the law of the State of its incorporation.

The law of the State by which a corporation is created governs in enforcing liability of a stockholder to pay his stock subscription and in establishing the relative rights and duties of stockholders and the corporation.

A failure by the court to give effect to and apply the law of the State of incorporation in consideration of a judgment rendered in that State amounts to denying full faith and credit to such judgment.

In this case held that a judgment rendered by a court of the State of incorporation holding an amendment to the constitution and by-laws of a fraternal and beneficiary corporation to be legal, amounted to a construction of the charter by the courts of the State which the courts of another State were bound to recognize under the [full faith and credit clause of the Federal Constitution](#).

A fraternal and beneficiary society is, for the purpose of controversies as to assessments, the representative of all of its members; and a judgment of the State of incorporation as to the validity of an amendment to the Constitution and by-laws must be given effect by the courts of another State even though not between the corporation and the same member.

[Green v. Elbert, 137 U.S. 615](#), followed in striking from the files of this court the brief of counsel of one of the parties on account of its being so full of vituperative, unwarranted and impertinent expressions in regard to opposing counsel.

[206 N.Y. 591](#), reversed.

Counsel: Mr. Howard C. Wiggins, with whom Mr. Curtis Waterman, Mr. John Haskell Butler, Mr. W. Holt Apgar and Mr. Joesph A. Langfitt were on the brief, for plaintiff in error.

Mr. F.J. Moissen for defendant in error:

Plaintiff in error is a corporation organized under the laws of Massachusetts; and, beyond such comity as any other State is willing to confer upon it, it has no corporate status in any other State, and is subject in such other State to any and all the laws, regulations and limitations prescribed therein upon foreign corporations.

The contract, the subject of the transaction herein, was made in and was to be performed in the State of New York, and therefore the rules of law as to its construction and performance must be under the laws of New York, and the laws of Massachusetts have no application.

Amendments to by-laws such as have been made to the by-laws of the plaintiffs in error as affecting contracts previously entered into by corporations like the plaintiffs in error have been held invalid by the courts of the State of New York as affecting such prior contracts and that rule of law is the policy of that State.

The Massachusetts judgment offered in evidence on the trial in the court below was properly excluded; it did not bind the defendant in error in any manner whatsoever, and the claim on the part of the plaintiff in error that the defendant in error is concluded by it, is absolutely untenable.

No Federal question was raised by the pleadings nor upon the trial in the court below, where, under the law of New York, it must be raised for the first time to be considered by the court either upon trial or upon appeal. That cannot be raised for the first time on appeal in this court.

Opinion by: WHITE

Opinion

[*533] [**724] [***1095] MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Conformably to the authority conferred by the general laws of Massachusetts to organize fraternal beneficiary

[*534] corporations, in 1877 there was issued to designated persons a certificate of incorporation under the name of the Supreme Council of the Royal Arcanum. By the constitution and by-laws, referred to in the certificate, the corporation became what is known as a fraternal association under the lodge system. Its principal objects as stated were:

"1st. To unite fraternally all white men of sound bodily health and good moral character, who are socially acceptable and between twenty-one and fifty-five years of age.

"2nd. To give all moral and material aid in its power to its members and those dependent upon them.

"3rd. To educate its members socially, morally and intellectually; also to assist the widows and orphans of deceased members.

"4th. To establish a fund for the relief of sick and distressed members.

"5th. To establish a widows' and orphans' benefit fund, from which, on the satisfactory [****725**] evidence of the death of a member of the order, who has complied with all its lawful requirements, a sum not exceeding [*****1096**] three thousand dollars shall be paid to his family, or those dependent on him, as he may direct. . . ."

There was power conferred by the constitution and by-laws to subsequently amend such constitution and by-laws in the manner therein provided. The general governing power of the Order was vested in the Supreme Council and the administration of its affairs under the supervision of such Council was entrusted to the officers named in the constitution. Authority was given to the Supreme Council to sanction the organization of local lodges or councils upon whom were conferred certain powers not in any way conflicting with the constitution and by-laws of the Order, and the members of such local lodges or councils were required to be members of the Order and [***535**] were subject to the duties and responsibilities which resulted from that relation and enjoyed also the resulting benefits.

Pursuant to the constitution under due authority there was organized in the State of New York a local lodge or council known as the De Witt Clinton Council No. 419 of the Royal Arcanum. In May, 1883, Samuel Green, the defendant in error, made application to become, and

was admitted as, a member of this council. In his application it was directed that in case of his death "all benefit to which I may be entitled from the Royal Arcanum, be paid to Louisa Green related to me as my wife, subject to such future disposal of the benefit, among my dependents, as I may hereafter direct, in compliance with the Laws of the Order. . . . I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the Laws, Rules, and Usages of the Order now in force, or which may hereafter be adopted by the same."

Upon the admission of the applicant a certificate was issued to him as a member of the De Witt Clinton Council No. 419, of the Royal Arcanum upon the condition, among others, "that the said member complies, in the future, with the laws, rules and regulations now governing the said Council and Fund, or that may hereafter be enacted by the Supreme Council to govern said Council and Fund." The certificate then stated that upon compliance with these conditions, "The Supreme Council of the Royal Arcanum hereby promises and binds itself to pay out of its Widows' and Orphans' Benefit Fund, to Louisa Green (wife) a sum not exceeding Three Thousand Dollars, in accordance with and under the provisions of the laws governing said Fund, upon satisfactory evidence of the death of said member. . . ."

At the time this certificate was issued, under the by-laws [***536**] the amount of the assessment required to be paid to the corporation to enable it to meet claims coming due under the Widows' and Orphans' Benefit Fund [*****1097**] was graded according to the age of the member, and the contribution required of Green for this purpose was stated in his certificate to be \$1.80 per assessment, and he paid up to 1898 at that rate various assessments called for under the rules of the order. In 1898 by a three-fourths vote of the Supreme Council, the system theretofore prevailing, exacting the payment of assessments as called for was changed and the duty was imposed to make payment monthly of a sum the amount of which, although still dependent upon the age of the member, was higher than had previously prevailed. Under these new rates the sum due from Green was \$3.16 per month, and he met regularly the payments thus exacted until the year 1905. In that year by the action of the Supreme Council taken in virtue of the requisite three-fourths vote, while the standard of age was continued, the sum to be paid was again increased so that the monthly assessment of Green

became \$6.87, and from October, 1905, when these new rates became effective, down to February, 1910, it is not disputed that Green paid the amount of the increased assessments monthly, although it was found by the trial court that he did so under protest because of a denial on his part of the right of the Supreme Council even under the sanction of the requisite vote and in compliance with the forms of the constitution and laws of the Order to increase the rates.

In the meanwhile shortly after the going into effect of the increased rates, that is, in November, 1905, sixteen members of the Order, holders of certificates under the Widows' and Orphans' Benefit Fund, filed a bill in the Supreme Judicial Court of Massachusetts against the corporation in their own behalf and in behalf of all other certificate holders to vacate and set aside the by-laws

[*537] by which the rates had been increased on the ground that the increase was ultra vires of the corporation and violative of contract rights. The case was submitted by agreement of counsel to the whole court upon an agreed statement of facts and was on May 17, 1906, decided. The court after a careful review of the general nature of the corporation, of the character of the fund, of the rights of its members as evidenced by the certificates, of the constitution and by-laws of the corporation and the laws of the State applicable [**726] thereto, decided that the increase complained of was valid, impaired no contract right of the certificate holders and was entitled to be enforced. *Reynolds v. Supreme Council, Royal Arcanum*, 192 Massachusetts, 150.

Four years after this decision Green ceased to make the payments required by the by-laws of the corporation and in virtue [***1098] of his membership and ownership of the certificate issued to him commenced in a state court in New York this suit against the Supreme Council and the Regent of De Witt Clinton Council No. 419, assailing the validity of the increase in the rate of assessment made in 1905 on the ground that it was void as exceeding the powers of the corporation and because conflicting with his contract rights as a member of the corporation and a certificate holder. The prayer of the bill was not that the corporation be restricted to the method and rate of assessment which prevailed in 1883 when the complainant became a member, but that the corporation be confined to the rate of assessment established by the amendment adopted in 1898 and that the complainant be decreed to have a contract right to pay only that sum monthly in discharge of his duty to pay assessments and that the corporation and its officers be enjoined during his life from exacting any

greater sum or in any way suspending him for refusing to pay the amount fixed by the amendment of 1905.

[*538] The answer in twenty-seven distinct paragraphs asserted the validity of the assessment and the action of the corporation by which it was established. It asserted that the complainant as a member in a mere beneficiary association was bound thereby and that no contract rights of his were affected. In many reiterated forms of statement it was asserted that the corporation was created under the laws of Massachusetts and was subject thereto and that under those laws, by which the power to make the change was to be determined, the validity of the change was beyond question. It was then alleged that the Reynolds suit in the courts of Massachusetts was brought by certain members and certificate holders against the corporation not only in their own behalf but as a class suit in favor of all others similarly situated and that the facts in that case were substantially identical with those presented in this. The judgment of the Supreme Judicial Court of Massachusetts maintaining the by-law and holding that the assessment was valid and binding and that no contract rights existing in favor of certificate holders were impaired by the increase of rate was explicitly referred to and in addition the twenty-seventh paragraph of the answer expressly counted on the judgment as follows:

"That the defendant Supreme Council says that the rights of the plaintiff in respect to his contract with the said defendant and his membership in the defendant order, and the changes adopted by it were and are concluded and determined by the aforesaid judgment of the Supreme Judicial Court of Massachusetts; that under the Constitution of the United States the same is entitled to full faith and credit in the State of New York, and that the complaint should be dismissed."

On the trial the proceedings and judgment in the Massachusetts court duly exemplified as required by the Act of Congress were offered in evidence and excluded [*539] and an exception reserved. The court made what in the record are styled findings of fact but which embrace every question of law which it was conceived the controversy could possibly involve. The court held that [***1099] the complainant was not barred by laches in consequence of his having accepted the amendment to the rates made in 1898, and that as he had protested in making the payments during the four years as to the rates fixed under the amendment of 1905, he was not estopped from questioning the validity

of that amendment. It was decided that under the law of New York as a certificate holder the complainant had a contract which entitled him to prevent any increase of rate over that established in 1898. So far as the law of Massachusetts was concerned it was declared that although it was governed by that law, the assessment would be valid, as the complainant was a member of a subordinate council existing in New York and doing business there, the rights of its members were controlled by the New York law wholly irrespective of the law of Massachusetts. The rights asserted by the complainant were adjudged to exist and the relief prayed for was granted.

The case then went to the Appellate Division of the Second Department. The court considering the character of the corporation, the provisions of its constitution and by-laws and the powers which they conferred on the corporation, as well as the application for membership and the certificate issued pursuant thereto, decided that the amendment as to rates was not ultra vires of the corporation but on the contrary was within its powers and violated no contract right of the complainant. Without deciding whether the case was controlled by the law of Massachusetts, and without passing upon the action of the trial court in seemingly rejecting the offer of the Massachusetts judgment, the court, treating **[**727]** that judgment as before it and considering besides the Massachusetts law as open **[*540]** for its consideration, held that the law of that State and the judgment there rendered served additionally to sustain the view taken as to the significance of the constitution and by-laws of the order and thus served additionally to demonstrate that error had been committed by the trial court in holding that under the law of New York there was a right to relief. 144 App. Div. (N.Y.) 761. The case then went to the Court of Appeals where the judgment of the Appellate Division was reversed and that of the trial court affirmed on the ground that the law of New York governed and established under the circumstances disclosed the right of the complainant to the relief which had been awarded him. [206 N.Y. 591](#).

It is not disputable that, disregarding details, all the rights asserted under the assignments of error come to one contention, that a violation of the [full faith and credit clause of the Constitution of the United States](#) resulted from refusing to hold that the rights of the parties were to be determined by the Massachusetts law and to apply that law, and in further refusing to give due effect to the decree rendered in Massachusetts concerning the subject of the controversy.

By a motion to dismiss it is urged that this question is not open for consideration because it was not raised below. But, as we have seen, the fact that the charter was a Massachusetts charter and the controlling character of the laws of that State on its **[***1100]** operation and effect were asserted by way of defense over and over again in the pleadings. It is, indeed, true that in none of the averments concerning the duty to apply the Massachusetts law and the validity under that law of the provision of the constitutions and by-laws which was assailed was any express reference made to the [full faith and credit clause of the Constitution of the United States](#), but this was not the case as to the Massachusetts judgment which was expressly pleaded, accompanied with an explicit averment that not **[*541]** to give it due effect would be a violation of the [full faith and credit clause of the Constitution of the United States](#). And as what was the due effect to be given to the judgment depended, as we shall hereafter more particularly point out, upon whether the Massachusetts law controlled the parties, since if it did, the judgment would be entitled to one effect, and if it did not, to another effect, it follows that the claim as to constitutional right concerning the judgment also involved deciding whether the Massachusetts law controlled. It follows that in both aspects the claim of full faith and credit under the Constitution of the United States was asserted, and whether the court below erred in holding that that clause was inapplicable because the contract was a New York contract governed by New York law is the question for decision. And the solution of that question involves two considerations: first, was the controversy to be determined with reference to the Massachusetts charter and laws and judgment; and second, if yes, did they sustain the right of the corporation to make the increased assessment complained of?

Before coming to consider the subject in its first aspect as controlled by authority, we briefly contemplate it from the light of principle in order that the appositeness of the authorities which are controlling may be more readily appreciated.

It is not disputable that the corporation was exclusively of a fraternal and beneficiary character and that all the rights of the complainant concerning the assessment to be paid to provide for the Widows' and Orphans' Benefit Fund had their source in the constitution and by-laws and therefore their validity could be alone ascertained by a consideration of the constitution and by-laws. This being true, it necessarily follows that resort to the

constitution and by-laws was essential unless it can be said that the rights in controversy were to be fixed by disregarding the source from which they arose and by putting out of view [*542] the only considerations by which their scope could be ascertained. Moreover, as the charter was a Massachusetts charter and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that State, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws. Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding on the one hand that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of members was to be tested isolated and individually by resorting not to one source of authority applicable to all but by applying many divergent, variable and conflicting criteria. In fact their destructive effect has long since been recognized. [Gaines v. Supreme](#) [*728] [Council of the Royal Arcanum](#), 140 Fed. Rep. 978; [Royal Arcanum v. Brashears](#), 89 Maryland, 624. And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, since an assessment which was one thing in one State and another in another, and a fund which was distributed by one rule in one State and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed. It was doubtless not only a recognition of the inherent unsoundness of the proposition here relied upon, but the manifest impossibility of its enforcement which has led courts of last resort of so many States in passing on questions involving the general authority of [*543] fraternal associations and their duties as to subjects of a general character concerning all their members to recognize the charter of the corporation and the laws of the State under which it was granted as the test and measure to be applied. [Supreme Lodge v. Hines](#), 82 Connecticut, 315; [Supreme Colony v. Towne](#), 87 Connecticut, 644; [Palmer v. Welch](#), 132 Illinois, 141; [Grimme v. Grimme](#), 198 Illinois, 265; [American Legion of Honor v. Green](#), 71 Maryland, 263; [Royal Arcanum v. Brashears](#), 89 Maryland, 624; [Golden Cross v. Merrick](#), 165 Massachusetts, 421; [Gibson v.](#)

[United Friends](#), 168 Massachusetts, 391; [***1101] [Larkin v. Knights of Columbus](#), 188 Massachusetts, 22; [Supreme Lodge v. Nairn](#), 60 Michigan, 44; [Tepper v. Royal Arcanum](#), 59 N.J. Eq. 321; [S.C.](#), 61 N.J. Eq. 638; [Bockover v. Life Association](#), 77 Virginia, 85. In fact, while dealing with various forms of controversy, in substance all these cases come at last to the principle so admirably stated by Chief Justice Marshall more than a hundred years ago ([Head v. Providence Insurance Co.](#), 2 Cranch, 127, 167) as follows:

"Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers. . . ."

In addition it was by the application of the same principle that a line of decisions in this court came to establish: first, that **HN1** the law of the State by which a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make; second, that the state law and proceedings are binding as to the ascertaining of [*544] the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected; and third, that **HN2** putting out of view the right of the person against whom a liability for a stockholder's subscription is asserted to show that he is not a stockholder, or is not the holder of as many shares as is alleged, or has claim against the corporation which at law or equity he is entitled to set off against the corporation, or has any other defense personal to himself, a decree against the corporation in a suit brought against it under the state law for the purpose of ascertaining its insolvency, compelling its liquidation, collecting sums due by stockholders for subscriptions to stock and paying the debts of the corporation, in so far as it determines these general matters, binds the stockholder, although he be not a party in a personal sense, because by virtue of his subscription to stock there was conferred on the corporation the authority to stand in judgment for the subscriber as to such general questions. [Selig v. Hamilton](#), 234 U.S. 652; [Converse v. Hamilton](#), 224 U.S. 243; [Bernheimer v. Converse](#), 206 U.S. 516; [Whitman v. National Bank](#), 176 U.S. 559; [Hawkins v. Glenn](#), 131 U.S. 319.

That the doctrines thus established if applicable here are conclusive is beyond dispute. That they are applicable clearly results from the fact that although the issues here presented as to things which are accidental are different from those which were presented in the cases referred to, as to every essential consideration involved the cases are the same and the controversy here presented is and has been therefore long since foreclosed.

The controlling effect of the law of Massachusetts being thus established and the error committed by the court below in declining to give effect to that law and in thereby disregarding the demands of the [full faith and credit clause](#) being determined, we come to consider whether the increase of assessment which was complained of was within [*545] the powers granted by the [**729] Massachusetts charter or conflicted with the laws of that State. Before doing so, however, we observe that the settled principles which we have applied in determining whether the controversy was governed by the Massachusetts law clearly make manifest how inseparably what constitutes the giving of full faith and credit to the Massachusetts judgment is involved in the consideration of the application of the laws of that State and therefore, as we have previously stated, how necessarily the express assertion of the existence of a right under the Constitution of the United States to full faith and credit as to the judgment was the exact equivalent of the assertion of a claim of right under the Constitution of the United States to the application of the laws of the State of Massachusetts. We say this because if the laws of Massachusetts were not applicable, the full faith and credit due to the judgment would require only its enforcement to the extent that it constituted the thing adjudged as between the parties to the record in the ordinary sense, and on the other hand, if the Massachusetts law applies, the full faith and credit due to the judgment additionally exacts that the right of the corporation to stand in judgment as to all members as to controversies concerning the power and duty to levy assessments must be recognized, the duty to give effect to the judgment in such case being substantially the same as the duty to enforce the judgment.

Additionally, before coming to dispose of [***1102] the final question it is necessary to say that in considering it in view of the fact that the Appellate Division treated the Massachusetts judgment as in the record and

considered it, and that the court below made no reference to its technical inadmissibility, but on the contrary treated the question as being one not of admissibility but of merits, we shall pursue the same course and treat the judgment as in the record upon the hypothesis that the action of the trial [*546] court did not amount to its technical exclusion but only to a ruling that as it deemed the law of Massachusetts inapplicable it so considered the judgment, and therefore held it merely irrelevant to the merits.

Coming then to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that State to determine the powers of the corporation and the rights and duties of its members, there is no room for doubt that the amendment to the by-laws was valid if we accept, as we do, the significance of the charter and of the Massachusetts law applicable to it as announced by the Supreme Judicial Court of Massachusetts in the Reynolds Case. And this conclusion does not require us to consider whether the judgment per se as between the parties, was not conclusive in view of the fact that the corporation for the purposes of the controversy as to assessments was the representative of the members. (See *Hartford Life Ins. Co. v. Ibs*, this day decided, post, 662.) Into that subject therefore we do not enter.

Before making the order of reversal we regret that we must say something more. The printed argument for the defendant in error is so full of vituperative, unwarranted and impertinent expressions as to opposing counsel that we feel we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. Indeed, we should have noticed the matter at once when it came to our attention after the argument of the case had we not feared that by doing so delay in the examination of the case and possible detriment to the parties would result. Following the precedent established in [Green v. Elbert, 137 U.S. 615](#), which we hope we may not again have occasion to apply, the brief of the defendant in error is ordered to be stricken from the files and the decree below in accordance with the [*547] views which we have expressed will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

CLA-000037

**LAW AND PRACTICE
OF
INTERNATIONAL
COMMERCIAL ARBITRATION**

FOURTH EDITION

By

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LONDON
SWEET & MAXWELL
2004

there is the law that governs, or regulates, the actual arbitration proceedings themselves. Next—and in most cases, most importantly—there is the law or the set of rules that the arbitral tribunal has to apply to the substantive matters in dispute before it. Finally, there is the law that governs recognition and enforcement of the award of the arbitral tribunal.

- 1-02 These laws may well be the same. The law that governs the arbitral proceedings (which will usually be the national law of the place of arbitration) may also govern the substantive matters in issue. But this is not necessarily so. The substantive law—that is, the law which governs the matters in issue (and which may also be known as the applicable law, the governing law or the proper law) may be an entirely different system of law. For example, an arbitral tribunal sitting in England, governed (or regulated) by English law as the law of the place of arbitration, may well be required to apply the law of New York as the applicable or substantive law of the contract.⁶ Moreover, the applicable or substantive law of the contract may not necessarily be a given national system of law. It may be international law; or a blend of national law and international law; or even an assemblage of rules of law known as international trade law, transnational law, the “modern law merchant” (the so-called *lex mercatoria*) or by some other convenient title.⁷ Finally, because most international arbitrations take place in a “neutral” country—that is to say, a country which is not that of the parties—the system of law which governs recognition and enforcement of the award of the arbitral tribunal will usually be different from that which governs the arbitral proceedings themselves.

This dependence of the international commercial arbitral process upon different, and sometimes conflicting rules of national and international law is one of the major themes of this book. First, however, it is necessary to consider the arbitral process itself and to understand what is meant by “international commercial arbitration”.

(b) A brief historical review

- 1-03 In its origins, the concept of arbitration as a method of resolving disputes was a simple one:

“The practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law; and after courts have been established by the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle it with less formality and expense than is involved in a recourse to the courts”.⁸

A distinguished French lawyer wrote of arbitration as an “apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties.”⁹ He added that, traditionally, countries of the civil law were hostile to arbitration as being “too primitive” a form of justice.

⁶ “Approaches to the Application of Transnational Public Policy by Arbitrators”, the *Journal of World Investment*, Geneva, April 2003, Vol.4 No.2 at p.239; this echoes the statement by Lord Mustill: “It is by now firmly established that more than one national system of law may bear upon an international arbitration”: *Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd* [1993] A.C. 334 at 357.

⁶ See, for instance, *XL Insurance v Owens Corning* [2000] 2 Lloyd’s Rep. 500.

⁷ The different systems or rules of law which may constitute the substantive law of an international commercial contract are discussed in Ch.2.

⁸ Holdsworth, *History of English Law* (1964), Vol.XIV, p.187.

⁹ Fouchard, *L’Arbitrage Commercial International* (1965), pp.1, 30 and 31 (translation by the authors).

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THE DEVELOPMENT OF THE
LAW OF INTERNATIONAL ORGANIZATION
BY THE DECISIONS
OF INTERNATIONAL TRIBUNALS

by

E. LAUTERPACHT, Q.C.

CHAPTER IV

INTERPRETATION OF CONSTITUTIONS

It will be evident from what has already been said on the subject of personality that the question of what international organizations are is really much less important than the question of that they can do ; and the answer in each case is largely dependent upon the relevant constitution. An international organization is an artificial and deliberate creation. It owes not only its existence but also its ability to act to the instrument which founds it. Hence the process of interpretation lies at the core of the law of international organization ; and no apology need be made for devoting the rest of these lectures to an extended consideration of this matter.

In the rational presentation of the process of interpretation the decisions of international tribunals and, in particular of the Permanent Court of International Justice and the International Court of Justice, play a paramount role. This is not to say that the techniques actually employed in the organizations themselves in the course of their daily deliberative and administrative activities are not relevant. But reference to such methods is exposed to certain difficulties. First, the records of debates do not, as a general rule, readily yield satisfactory evidence of the mode of interpretation which may have been employed by a particular organ in reaching its collective decision. Secondly, so far as the speeches of the representatives of individual members are concerned, it is not always easy to disentangle considerations possessing objective validity from those which represent special pleading motivated by surrounding political or other circumstances. And so it appears more prudent to construct our statement of the process of interpretation upon the reasoned and objective decisions of international tribunals.

1. Treaty or Constitution ?

The Permanent Court and the International Court (either of which we may for convenience call "the Court") have between them been called upon a score of times to interpret international constitutional instruments. Yet it is a feature of the relevant judgments and opinions, at least so far as the majority judgments of the Court itself are concerned, that they contain no express reference to the "constitutional" character

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obligation of a state party, notably when it is contrary to a peremptory norm of international law;⁹ and in all cases the *content* of a treaty obligation depends on the interpretation of the treaty, a process governed by international law.¹⁰ A treaty may even be displaced by a subsequent rule of customary international law, at least where its effects are recognized in the subsequent conduct of the parties.¹¹

Dating back to 1920, Article 38 has been described, *inter alia*, as out of date, narrow and ill-adapted to modern international relations.¹² But in practice it is malleable enough, and its emphasis on general acceptance is right: customary law is not to be confused with the last emanation of will of the General Assembly.¹³

3. INTERNATIONAL CUSTOM¹⁴

(A) THE CONCEPT OF CUSTOM

Article 38 refers to 'international custom, as evidence of a general practice accepted as law'. The wording is *prima facie* defective: the existence of a custom is not to be confused with the evidence adduced in its favour; it is the conclusion drawn by someone (a legal adviser, a court, a government, a commentator) as to two related questions: (a) is there a general practice; (b) is it accepted as international law? Judge Read has described customary international law as 'the generalization of the practice of States',¹⁵ and so it is; but the reasons for making the generalization involve an evaluation of whether the practice is fit to be accepted, and is in truth generally accepted, as law.

Although the terms are sometimes used interchangeably, 'custom' and 'usage' are terms of art with different meanings. A usage is a general practice which does not reflect a legal obligation: examples include ceremonial salutes at sea and the practice of granting certain parking privileges to diplomatic vehicles.¹⁶ Such practices are carried on out of courtesy (or 'comity') and are neither articulated nor claimed as legal

⁹ Indeed this is the *definition* of a peremptory norm, at least according to VCLT, Art 53. Further: chapter 27.

¹⁰ Cf VCLT, Arts 31–3. Further: chapter 16.

¹¹ *Air Transport Services Agreement* (1963) 38 ILR 182, 248–55.

¹² Thirlway, in Evans (3rd edn, 2010) 95, 99.

¹³ *Ibid*, 115.

¹⁴ Sfériadès (1936) 43 RGDIP 129; de Visscher (1955) 59 RGDIP 353; Lauterpacht, *Development* (1958) 368–93; D'Amato, *The Concept of Custom in International Law* (1972); Thirlway, *International Customary Law and Codification* (1972); Akehurst (1974–75) 47 BY 1; Bernhardt (1976) 36 ZaöRV 50; Haggenmacher (1986) 90 RGDIP 5; Stern, *Mélanges Reuter* (1981) 479–99; Kirgis (1987) 81 AJIL 146; Thirlway (1990) 61 BY 1, 31–110; Wolfke, *Custom in Present International Law* (2nd edn, 1993); Mendelson (1995) 66 BY 177; ILA, Report of the Sixty-Ninth Conference (2000) 712; Thirlway (2005) 76 BY 1, 92–108; Perreau-Saussine & Murphy (eds), *The Nature of Customary Law* (2007); Orakhelashvili (2008) 68 ZaöRV 69; d'Aspremont, *Formalism and the Sources of International Law* (2011) 162–70; Kammerhofer, *Uncertainty in International Law* (2011) 59–85. For approaches to custom that draw on economic theory: Goldsmith & Posner (1999) 66 U Chic LR 1113; Norman & Trachtman (2005) 99 AJIL 541.

¹⁵ *Fisheries (UK v Norway)*, ICJ Reports 1951 p 116, 191 (Judge Read).

¹⁶ *Parking Privileges for Diplomats* (1971) 70 ILR 396; Roberts (ed), *Satow's Diplomatic Practice* (6th edn, 2009) §9.15.

authorize the Court to apply the general principles of municipal jurisprudence, in particular of private law, insofar as they are applicable to relations of States'.⁹² The latter part of this statement is significant. Tribunals have not adopted a mechanical system of borrowing from domestic law. Rather they have employed or adapted modes of general legal reasoning as well as comparative law analogies in order to make a coherent body of rules for application by international judicial process. It is difficult for state practice to generate the evolution of the rules of procedure and evidence as well as the substantive law that a court must employ. An international tribunal chooses, edits, and adapts elements from other developed systems. The result is a body of international law the content of which has been influenced by domestic law but which is still its own creation.⁹³

(A) GENERAL PRINCIPLES OF LAW IN THE PRACTICE OF TRIBUNALS

(i) Arbitral tribunals

Arbitral tribunals have frequently resorted to analogies from municipal law. In the *Fabiani*⁹⁴ case between France and Venezuela the arbitrator had recourse to municipal public law on the question of state responsibility for the state's agents, including judicial officers, for acts carried out in an official capacity. The arbitrator also relied on general principles of law in assessing damages. The Permanent Court of Arbitration applied the principle of moratory interest on debts in *Russian Indemnity*.⁹⁵ Since the Statute of the Permanent Court was concluded in 1920, tribunals not otherwise bound by it have generally treated Article 38(1)(c) as declaratory.⁹⁶

In practice tribunals show considerable discretion in matters involving general principles. Decisions on the acquisition of territory tend not to reflect domestic derivatives of real property, and municipal analogies may have done more harm than good here. The evolution of the rules on the effect of duress on treaties has not depended on changes in domestic law.⁹⁷ In *North Atlantic Fisheries* the tribunal considered the concept of servitude but refused to apply it.⁹⁸ Moreover, in some cases, for example those

⁹² 1 Oppenheim, §12.

⁹³ See Tunkin (1958) 95 Hague *Recueil* 5, 23–6; de Visscher, *Theory and Reality in Public International Law* (3rd edn, 1968) 400–2. Cf *South West Africa*, ICJ Reports 1950 p 128, 158 (Judge McNair, diss).

⁹⁴ (1902) 10 RIAA 83. The claim was based on denial of justice by the Venezuelan courts.

⁹⁵ (1912) 1 HCR 297. See also *Sarropoulos v Bulgaria* (1927) 4 ILR 263 (extinctive prescription).

⁹⁶ See e.g. *US v Germany* (1923) 2 ILR 367; *Roumania v Germany* (1927) 4 ILR 542; *Lena Goldfields* (1929) 5 ILR 3; *Greek Powder & Cartridge Co v German Federal Republic* (1958) 25 ILR 544, 545; *Arbitration between Newfoundland and Labrador and Nova Scotia* (2002) 128 ILR 425, 534–5; *Feldman v Mexico* (2002) 126 ILR 26, 42; *Waste Management v Mexico* (2002) 132 ILR 146, 171–2; *Abyei Arbitration* (2009) 144 ILR 348, 504.

⁹⁷ Nineteenth-century writers took the view that duress directed against the state had no vitiating effect. Since 1920 the contrary view has been accepted, under the influence not of domestic analogy but developments in the law relating to the use of force: VCLT, Arts 51–2, and further: chapters 16, 33.

⁹⁸ (1910) 1 HCR 141.

and remarked that ‘this indirect evidence is admitted in all systems of law, and its use is recognized by international decisions’.¹⁰⁸ In his dissenting opinion in *South West Africa (Second Phase)*, Judge Tanaka referred to Article 38(1)(c) of the Court’s Statute as a basis for grounding the legal force of human rights concepts and suggested that the provision contains natural law elements.¹⁰⁹ The Court’s reasoning in *Barcelona Traction* relied on the general conception of the limited liability company in municipal legal systems,¹¹⁰ a position repeated in *Diallo*.¹¹¹

(B) GENERAL PRINCIPLES OF INTERNATIONAL LAW

The rubric ‘general principles of international law’ may alternately refer to rules of customary international law, to general principles of law as in Article 38(1)(c), or to certain logical propositions underlying judicial reasoning on the basis of existing international law. This shows that a rigid categorization of sources is inappropriate. Examples of this type of general principle of international law are the principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas. In many cases these principles may be traced to state practice. However, they are primarily abstractions and have been accepted for so long and so generally as no longer to be *directly* connected to state practice. Certain fundamental principles of international law enjoy heightened normativity as peremptory norms (see chapter 27).

6. JUDICIAL DECISIONS¹¹²

(A) JUDICIAL DECISIONS AND PRECEDENT IN INTERNATIONAL LAW

Judicial decisions are not strictly a formal source of law, but in many instances they are regarded as evidence of the law. A coherent body of previous jurisprudence will have important consequences in any given case. Their value, however, stops short of precedent as it is understood in the common law tradition.

Article 38(1)(d) starts with a proviso: ‘[s]ubject to the provisions of Article 59, judicial decisions ... as subsidiary means for the determination of rules of law’. The significance of the word ‘subsidiary’ here is not to be overstated.¹¹³ Article 59 provides that a decision of the Court has ‘no binding force except as between the parties and

¹⁰⁸ ICJ Reports 1949 p 4, 18. Also: *Right of Passage*, Preliminary Objections, ICJ Reports 1957 p 125, 141–2; *German Interests*, Preliminary Objections (1925) PCIJ Ser A No 6, 19.

¹⁰⁹ ICJ Reports 1966 p 6, 294–9 (Judge Tanaka, diss).

¹¹⁰ *Barcelona Traction*, ICJ Reports 1970 p 3, 33–5.

¹¹¹ *Diallo*, Judgment of 30 November 2010, §47.

¹¹² Generally: Lauterpacht (1958) 8–22. Further: Pellet, in Zimmermann et al (2006) 784–90.

¹¹³ Fitzmaurice, in *Symbolae Verzijl* (1958) 153, 174 (criticizing the classification).

principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig.²⁶

An associated question is whether the mere enactment of legislation can give rise to international responsibility, or whether an obligation is only breached when the state implements that legislation. There is a general duty to bring national law into conformity with obligations under international law,²⁷ but what this entails depends on the obligation in question. Normally a failure to bring about such conformity is not in itself a breach of international law; that arises only when the state concerned fails to observe its obligations on a specific occasion.²⁸ But in some circumstances legislation (in its absence) could of itself constitute a breach of an international obligation, for example where a state is required to prohibit certain conduct or to enact a uniform law.

(ii) National laws as 'facts' before international tribunals

In *Certain German Interests in Polish Upper Silesia*, the Permanent Court observed:

From the standpoint of International Law and of the Court which is its organ, national laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.²⁹

Thus a decision of a national court or a legislative measure may constitute evidence of a breach of a treaty or of customary international law.³⁰ However, the general proposition that international tribunals take account of national laws only as facts 'is, at most ... debatable'.³¹

The concept of national law as 'merely facts' has at least six distinct aspects.

(a) National law may itself constitute, or be evidence of, conduct in violation of a rule of treaty or customary law.

(b) National law may be part of the 'applicable law' either governing the basis of a claim or more commonly governing a particular issue.

(c) Whereas the principle *iura novit curia* applies to international law, it does not apply to matters of national law. International tribunals will generally require proof of

²⁶ *Treatment of Polish Nationals in the Danzig Territory* (1932) PCIJ Ser A/B No 44, 24. Also: *Georges Pinson (France) v United Mexican States* (1928) 5 RIAA 327.

²⁷ *Exchange of Greek and Turkish Populations* (1925) PCIJ Ser B No 10, 20. The principle applies to both unitary and federal states.

²⁸ McNair, *Treaties* (1961) 100. Cf Fitzmaurice (1957) 92 *Hague Recueil* 1, 89.

²⁹ (1926) PCIJ Ser A No 7, 19.

³⁰ *India—Patents*, WTO Doc WT/DS50/AB/R, 15 December 1997, §65.

³¹ Jenks, *The Prospects of International Adjudication* (1964) 552, 548.

REDFERN AND
HUNTER ON
INTERNATIONAL
ARBITRATION

NIGEL BLACKABY
CONSTANTINE PARTASIDES
WITH
ALAN REDFERN
MARTIN HUNTER

OXFORD
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say, an ICC arbitration to an *ad hoc* arbitration or vice versa; but if they do so, a new arbitration agreement should be made, submitting the existing dispute—by way of submission agreement—to arbitration.

E. Submission Agreements

(a) Introduction

The position of the parties and their advisers in dealing with a submission agreement is radically different from the position that exists when an arbitration clause is being written into a contract. First, a dispute has actually arisen, and usually this means that there will be a hostile element in the relationship. Secondly, from a technical point of view, the legal advisers know what kind of dispute they are facing, and they will wish to structure the arbitration to deal with it efficiently and appropriately. Thirdly, the interests of the parties may conflict, in that the claimant usually wants a speedy resolution, whereas the respondent often considers that it will be to his advantage to create delay.¹⁵⁵ For all these reasons, the negotiation of a submission agreement may be a lengthy process. However, the importance of 'getting it right' cannot be overemphasised.¹⁵⁶ 2.106

(b) Drafting a submission agreement

The submission agreement should contain many, if not all of the basic elements of an arbitration agreement. In addition, it should contain a definition, or at least an outline, of the disputes that are to be arbitrated; provision for a possible site inspection; provision for appointment of experts by the arbitral tribunal; provision for interim awards; provision for the costs of the proceedings; and provisions concerning the award, including a provision covering what is to happen if the arbitrators fail to reach agreement; and, finally, an agreement that the award of the arbitral tribunal is to be final and binding upon the parties. 2.107

It is also possible to include in the submission agreement procedural arrangements, such as for production of documents, exchange of written submissions and witness statements, the timetable to be followed, and other matters. On balance, however, it is probably better to deal with such questions in a separate document, 2.108

¹⁵⁵ Although it should of course be borne in mind that the claimant may be compensated for the delay by an award of interest, and that delay is usually only achieved by the expenditure of costs—eg the determination of a preliminary issue. Ultimately, the respondent may be directed to pay the costs of the arbitration, particularly if it is considered that its conduct has contributed to the delay. See Ch 8.

¹⁵⁶ See, for instance, the discussion of the arbitration between Turriff Construction (Sudan) Ltd and the Government of the Republic of the Sudan, below, para 2.109.

perhaps with the assistance of the arbitral tribunal once the arbitration has commenced.

(i) *An illustration*

- 2.109 The importance of ensuring that the submission agreement deals with all these matters emerges clearly from the *Turriff* arbitration, which took place at the Peace Palace in The Hague.¹⁵⁷ During the course of the proceedings two of the three arbitrators originally appointed resigned and the respondent withdrew, leaving the arbitration to proceed as a default arbitration.¹⁵⁸ The resignation of the presiding arbitrator on grounds of ill health was dealt with by agreement; the Canadian chairman was replaced by a Dutch judge. The withdrawal of the Government from the arbitration could *not* be dealt with by agreement, since by then all cooperation between the parties had ceased. However, the arbitral tribunal had express power under the submission agreement to proceed in default (that is to say, in the absence of one of the parties). It decided to do this and a date was fixed for an adjourned hearing. A third crisis prevented this. The Sudanese arbitrator failed to attend the adjourned hearing. One of the arbitrators, who had been delegated by the arbitral tribunal to deal with procedural matters, fixed a new date for the hearing. He ordered that, in the absence of the Sudanese arbitrator, Turriff's oral argument and evidence should be presented before two members of the arbitral tribunal (ie, a truncated tribunal) and should be fully recorded, authenticated, and preserved.¹⁵⁹
- 2.110 Under the submission agreement, it was for the Government to appoint a new arbitrator¹⁶⁰ within 60 days. When it failed to do this, Turriff asked the President of the International Court of Justice (ICJ) to make the appointment, which he did. Thereupon, the remaining two arbitrators were deemed to have been reappointed. In this way a new arbitral tribunal was constituted; and the hearing then continued *ex parte* as before, with the new arbitrator reading the transcript of the previous days' proceedings, in order to acquaint himself with the facts. In April 1970, the arbitral tribunal issued an award under which the Government

¹⁵⁷ A more recent example of a case involving the interpretation of a submission agreement is *Applied Industrial Materials Corp v Ovalar Makne Ticaret Ve Sanayi AS*, No OS Civ 10540, 2006 WL 1816383 (SDNY 28 June 2006). In this case, the parties signed a submission agreement which required the arbitrators to disclose any circumstance which could impair their ability to render an unbiased award. In determining whether this was an ongoing obligation of disclosure, the court looked to the words of the submission agreement to interpret the parties' agreement in this regard.

¹⁵⁸ The case is briefly noted in Stuyt, *Survey of International Arbitrations 1794-1970* (1976), App I, Case No A31; and more fully by Erades, 'The Sudan Arbitration' (1970) NTIR 2, at 200-222. Dr Erades became presiding arbitrator on the resignation of his predecessor. It is also commented upon by Schwebel in *International Arbitration: three salient problems* (1987).

¹⁵⁹ Erades, n 158 above, 209.

¹⁶⁰ Although this was not known at the time, the Government had in fact made an order revoking or purporting to revoke the Sudanese judge's appointment as an arbitrator.

was ordered to pay a sum of over £6 million, together with an additional sum to cover Turriff's legal costs and the costs, fees, and expenses of the arbitral tribunal.¹⁶¹

F. Arbitrability

(a) Introduction

Arbitrability, in the sense in which it is used both in this book and generally,¹⁶² involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts. Both the New York Convention and the Model Law are limited to disputes that are 'capable of settlement by arbitration'.¹⁶³ 2.111

In principle, *any* dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a national court. Article 2059 of the French Civil Code, for example, provides that 'all persons may enter into arbitration agreements relating to the rights that they may freely dispose of'. Although Article 2060 further provides that parties may not agree to arbitrate disputes in a series of particular fields (eg family law), and 'more generally in all matters that have a public interest' (*plus généralement dans toutes les matières qui intéressent l'ordre public*), this limitation has been construed in a very restrictive way by French courts. Similarly, section 1030(1) and (2) of the German Code of Civil Procedure provides that any claim involving an economic interest (*Vermögensrechtlicher Anspruch*) can be subject to arbitration, as can claims not involving an economic interest of which the parties may freely dispose. 2.112

However, it is precisely because arbitration is a private proceeding with public consequences¹⁶⁴ that some types of dispute are reserved for national courts, whose 2.113

¹⁶¹ Erades, n 158 above, 222. To complete the story, negotiations took place between the Government and Turriff after the issue of the award and the company accepted in settlement a substantial part of the sum awarded.

¹⁶² In the US and elsewhere, there is sometimes discussion by judges and others as to whether a particular dispute is 'arbitrable', in the sense that it falls within the scope of the arbitration agreement. The concern in such cases is with the court's jurisdiction over a particular dispute rather than a more general enquiry as to whether the dispute is of the type that comes within the domain of arbitration. See Zekos, 'Courts' Intervention in Commercial and Maritime Arbitration under US Law' (1997) 14 J Intl Arb 99. For a general discussion of 'arbitrability' in the sense of 'legally capable of settlement by arbitration', see Sanders, 'The Domain of Arbitration' in the 'Arbitration' section of *Encyclopaedia of International and Comparative Law* (Martinus Nijhoff), Vol XVI, Ch 12, 113 *et seq*; see also Hanotiau, 'The Law Applicable to the Issue of Arbitrability' ICCA Congress, Series No 14, Paris, 1998.

¹⁶³ New York Convention, Arts II(1) and V(2)(a); Model Law, Arts 34(2)(b)(i) and 36(1)(b)(i).

¹⁶⁴ For instance, in the recognition and enforcement of the award.

proceedings are generally in the public domain. It is in this sense that they are not 'capable of settlement by arbitration'.

- 2.114 National laws establish the domain of arbitration, as opposed to that of the local courts. Each State decides which matters may or may not be resolved by arbitration in accordance with its own political, social, and economic policy. In some Arab States, for example, contracts between a foreign corporation and its local agent are given special protection by law and, to reinforce this protection, any disputes arising out of such contracts may only be resolved by the local courts. In the United States, consumer arbitration appears to be under legislative attack. At the time of writing, a bill called the 'Arbitration Fairness Act of 2007' is pending in the US proposing to invalidate any arbitration clause in a consumer contract, on the grounds that the consumer buying a product who signs a standard invoice containing an arbitration clause in reality has little or no choice on whether to select arbitration.¹⁶⁵ The legislators and courts in each country must balance the domestic importance of reserving matters of public interest to the courts against the more general public interest in promoting trade and commerce and the settlement of disputes. In the international sphere, the interests of promoting international trade as well as international comity have proved important factors in persuading the courts to treat certain types of dispute as arbitrable.¹⁶⁶
- 2.115 If the issue of arbitrability arises, it is necessary to have regard to the relevant laws of the different States that are or may be concerned. These are likely to include the law governing the party involved, where the agreement is with a State or State entity; the law governing the arbitration agreement; the law of the seat of arbitration; and the law of the ultimate place of enforcement of the award.
- 2.116 Whether or not a particular type of dispute is 'arbitrable' under a given law is in essence a matter of public policy for that law to determine. Public policy varies from one country to the next, and indeed changes from time to time.¹⁶⁷ The most

¹⁶⁵ Other jurisdictions have grappled with consumer arbitration as well; see England and Sweden.

¹⁶⁶ See the *Mitsubishi* case, discussed below. However, the opposite is often argued in the context of less developed countries. In that situation, it is suggested that the State should impose very strict limits on arbitrability, especially in respect of disputes involving State entities. The reason for such a policy is that this is the only way for these States to retain control over foreign trade and investment, where more economically powerful traders may have an unfair advantage. See Sornarajah, 'The UNCITRAL Model Law: A Third World Viewpoint' (1989) 6 J Intl Arb 7 at 16.

¹⁶⁷ The concept of so-called 'international public policy' which may impose limits on the arbitrability of certain agreements—for instance, an agreement to pay bribes (below, paras 2.122 *et seq*)—is considered later, in Ch 11, in the context of challenging recognition and enforcement of arbitral awards.

that can be done here is to indicate the categories of dispute that may fall outside the domain of arbitration.

Reference has already been made in passing to contracts of agency, for which special provision may be made in some States as a matter of public policy. More generally, criminal matters and those which affect the status of an individual or a corporate entity (such as bankruptcy or insolvency) are usually considered as not arbitrable. In addition, disputes over the grant or validity of patents and trade marks may not be arbitrable under the applicable law. These various categories of dispute are now considered in greater detail. 2.117

(b) Categories of dispute for which questions of arbitrability arise

(i) *Patents, trade marks, and copyright*

Whether or not a patent or trade mark should be granted is plainly a matter for the public authorities of the State concerned, these being monopoly rights that only the State can grant. Any dispute as to their grant or validity is outside the domain of arbitration. However, the owner of a patent or trade mark frequently issues licences to one or more corporations or individuals in order to exploit the patent or trade mark; and any disputes between the licensor and the licensee may be referred to arbitration. Indeed, disputes over such intellectual property rights are commonly referred to international arbitration. First, because this gives the parties an opportunity to select for themselves a tribunal of arbitrators experienced in such matters, and secondly, and perhaps more importantly, because of the confidentiality of arbitral proceedings, which helps to provide a safeguard for trade secrets.¹⁶⁸ 2.118

Unlike patents or trade marks, copyright is an intellectual property right which exists independently of any national or international registration, and may be freely disposed of by parties. There is, therefore, generally no doubt that disputes relating to such private rights may be referred to international arbitration. 2.119

(ii) *Antitrust and competition laws*

Adam Smith, writing in the eighteenth century, said: 2.120

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.¹⁶⁹

This early distrust of monopolies and cartels finds its modern echo in increasingly wide-ranging antitrust (or competition) legislation across the world.

¹⁶⁸ See generally, Lew, 'Intellectual Property Disputes and Arbitration', Final Report of the Commission on International Arbitration (ICC Publication, 1997), especially 7-15.

¹⁶⁹ Adam Smith, *The Wealth of Nations* (1776) Book 1, Ch 10, Pt 2.

Amongst national legislators, the US has been prominent, beginning with the celebrated Shearman Act in 1890. Similarly, in 1958 the European Community adopted rules of law that were to be directly applicable in all Member States, and which prohibit agreements and arrangements having as their object or effect the prevention, restriction, or distortion of competition (Article 81 of the EU Treaty), as well as any abuse of a dominant position (Article 82), within what is now the European Union. Articles 81 and 82 have historically been enforced primarily by the European Commission, which has the power to investigate, prohibit behaviours, impose heavy fines, and also to grant exemptions pursuant to Article 81(3) where appropriate in the light of the wider benefits of the activity or agreement that infringes Article 81.¹⁷⁰

- 2.121 What can an arbitral tribunal do when confronted with an allegation that the contract under which the arbitration is brought is itself an illegal restraint of trade or in some other way a breach of antitrust law? For example, in disputes between the licensor of a patent and the licensee, it has become almost standard practice for the licensor to allege, amongst a series of defences, that in any event the licence agreement is void for illegality. In general, an allegation of illegality should not prevent an arbitral tribunal from adjudicating on the dispute, even if its finding is that the agreement in question is indeed void for illegality. This is because, under the doctrine of separability,¹⁷¹ the arbitration clause in a contract constitutes a separate agreement and survives the contract of which it forms part. More specifically, it is now widely accepted that antitrust issues are arbitrable. In France, the arbitrability of competition law issues is now well established, having been acknowledged in the *Mors/Labinal* case in 1993,¹⁷² and reaffirmed by the Cour de Cassation in 1999.¹⁷³ Likewise, in Switzerland, the arbitrability of EU competition law was recognised by a decision of the Federal Tribunal in 1992, in which the court found that:

Neither Article 85 of the [EU] Treaty nor Regulation 17 on its application forbid a national court or an arbitral tribunal to examine the validity of that contract.¹⁷⁴

¹⁷⁰ Agreements which offend against Art 81 are void under Art 81(2), unless an exemption is granted under Art 81(3). Until 1 May 2004 the power to grant exemptions fell to the European Commission alone. Since then, pursuant to Council Regulation No 1/2003, the power has been extended to national courts and competition authorities. Although the Regulation does not mention arbitral tribunals specifically, it changed the landscape of EU competition law and opened the door to arbitration as an arena for the private enforcement of EU competition rules. In this regard see Dempegiotis, 'EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003—Conceptual Conflicts, Common Ground and Corresponding Legal Issues' (2008) 25 J Intl Arb, 3, 365–395.

¹⁷¹ Under this doctrine, the arbitration clause in a contract is regarded as separate from, and independent of, the contract of which it forms part: see above para 2.89.

¹⁷² See the decision of the Cour d'Appel de Paris of 19 May 1993 [1993] Rev Arb 645, n Jarrosson.

¹⁷³ See the decision of the Cour de Cassation of 5 January 1999.

¹⁷⁴ Decision of the Tribunal Fédéral, 28 April 1992 [1992] A SA Bull 368. The same court reaffirmed this position in its decision of 13 November 1998 [1999] A SA Bull 529 and 455.

The US Supreme Court had already adopted this approach in the well-known *Mitsubishi* case.¹⁷⁵ At one time, it was held in the US that claims under the antitrust laws were not capable of being resolved by arbitration, but had to be referred to the courts. In the *American Safety* case,¹⁷⁶ the reaction of the court was that:

A claim under the antitrust laws is not merely a private matter . . . Antitrust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic damage. We do not believe Congress intended such claims to be resolved elsewhere than the Courts.¹⁷⁷

However, in *Mitsubishi* the US Supreme Court, by a majority of five to three, decided that antitrust issues arising out of international contracts were arbitrable under the Federal Arbitration Act. This was so despite:

- the public importance of the antitrust laws;
- the significance of private parties seeking treble damages as a disincentive to violation of those laws; and
- the complexity of such cases.

In its judgment, the court stated:

. . . we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

However, the court went on to point out that the public interest in the enforcement of antitrust legislation could be asserted, if necessary, when it came to enforcement of any award made by the arbitral tribunal. The court stated:

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The [New York Convention] reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to a public policy of that country'.¹⁷⁸

¹⁷⁵ *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985). And see generally: 'Competition and Arbitration', Dossier of the Institute of International Business Law and Practice, ICC (1993).

¹⁷⁶ *American Safety Equipment Corp v JP Maguire Co*, 391 F 2d 821 (2nd Cir 1968).

¹⁷⁷ *Ibid*, at 826.

¹⁷⁸ *Mitsubishi Motors Corp*, n 175 above, at 628. However, see *Baxter Int v Abbott Laboratories*, 315 F 3d 163 (2nd Cir 2004), in which the US Court's 'second look' was very limited in scope. In that case, the US Supreme Court limited its review to ensuring only that 'the tribunal took cognizance of antitrust claims and actually decided them'.

Responsibility of States for Internationally Wrongful Acts 2001

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Responsibility of States for Internationally Wrongful Acts

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

GENERAL PRINCIPLES

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II

ATTRIBUTION OF CONDUCT TO A STATE

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5
Conduct of persons or entities exercising elements
of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6
Conduct of organs placed at the disposal of a State
by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7
Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9
Conduct carried out in the absence or default
of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10
Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15
Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV
RESPONSIBILITY OF A STATE IN CONNECTION WITH THE
ACT OF ANOTHER STATE

Article 16
Aid or assistance in the commission of an
internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

Article 17
Direction and control exercised over the commission
of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

Article 18
Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) the coercing State does so with knowledge of the circumstances of the act.

Article 19
Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V
CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20
Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21
Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22
Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23
Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

- (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) the State has assumed the risk of that situation occurring.

Article 24

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

- (a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) the act in question is likely to create a comparable or greater peril.

Article 25

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) the international obligation in question excludes the possibility of invoking necessity; or
- (b) the State has contributed to the situation of necessity.

Article 26

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27

*Consequences of invoking a circumstance
precluding wrongfulness*

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) the question of compensation for any material loss caused by the act in question.

PART TWO
CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
GENERAL PRINCIPLES

Article 28
Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30
Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) to cease that act, if it is continuing;
- (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31
Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32
Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33

Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II

REPARATION FOR INJURY

Article 34

Forms of reparation

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.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37

Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38

Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39

Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY

NORMS OF GENERAL INTERNATIONAL LAW

Article 40

Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41

*Particular consequences of a serious breach
of an obligation under this chapter*

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE
THE IMPLEMENTATION OF THE INTERNATIONAL
RESPONSIBILITY OF A STATE

CHAPTER I
INVOCATION OF THE RESPONSIBILITY OF A STATE

Article 42
Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) that State individually; or
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) specially affects that State; or
 - (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43
Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

- (a) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
- (b) what form reparation should take in accordance with the provisions of part two.

Article 44
Admissibility of claims

The responsibility of a State may not be invoked if:

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

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

Article 45

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) the injured State has validly waived the claim;

(b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46

Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) is without prejudice to any right of recourse against the other responsible States.

Article 48

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 State in accordance with paragraph 2 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.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II COUNTERMEASURES

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of fundamental human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible State;

(b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51
Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;

(b) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

Article 54
Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR
GENERAL PROVISIONS

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.

Article 56
*Questions of State responsibility not regulated
by these articles*

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57
Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58
Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59
Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

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A. Notion of Conflict

1 The issue of solving conflicts between international treaties is closely linked to the applicability and validity of treaties (Treaties, Validity) and, ultimately, their effectiveness to pursue and achieve their relevant objectives. If rights and duties of parties to an international treaty are unclear due to contradicting rules established by another instrument, the observance of either of the instruments will suffer. A strict notion of conflicts between treaties implies that both cannot be applied simultaneously. To solve the conflict either another rule, eg a derogation norm, or a specific method, eg interpretation in international law, has to be applied to decide which of the conflicting treaty provisions is given preference over the other. A further relevant question concerns the legal consequence for the treaty that is superseded by another according to an applicable method of conflict resolution. In this context the main issues are related to whether and to what extent the inferior agreement is applicable between certain parties.

1. Parallel Existence of Treaties in International Law

2 Conflicts between legal norms are no particularity of international law, they can occur between norms on the domestic, the supranational and the international level and between norms from different levels. In national legal orders, however, conflicts between legal norms are easier to approach. The unity of the legal order is a prerequisite on the domestic level and a more centralized and hierarchical structure of legislation prevents and solves conflicts. This also applies to federal legal systems, since legal norms set by the different legislators are ordered by a hierarchical principle. A hierarchy that attaches a certain rank to each norm and thereby forms a formal order of norms is a viable means to restrict the issue of collisions to those between norms of the same legal rank. The lack of a centralized legislator, the lack of continuity in international law-making, and the lack of a comprehensive hierarchical structure of international law result in an enhanced probability of contradictions and, at the same time, a shortcoming of feasible rules to address and resolve conflicts.

3 Conflicts between international legal norms are not confined to contradictions between different treaties, although international law derived from treaties constitutes the vast majority of international legal rules. International law knows neither a general hierarchy between its different sources nor, in principle, between different international treaties. Adopting a formal perspective, international treaties appear as independent and self-sufficient entities. According to Reuter '[a] series of treaties does not, in mathematical terms, constitute an ordered "set" but an "accumulation"' (at para. 196). Despite their parallel existence, however, multilateral agreements are usually interlinked by an at least partial overlap of the contracting parties and, potentially, also by the subject-matters covered by the treaties. Due to the fragmentary nature of international law as a legal order without a single legislator (see also Fragmentation of International Law), it is not inevitable that subject-matters addressed by new agreements have already been previously subject to regulation by legal agreement. Yet, it is obvious that certain subjects, eg the achievement and maintenance of transnational peace, conduct in times of war, transnational trade relations, the use of the seas and, more recently, the conservation of environmental resources, have frequently been subject to bilateral, regional or universal multilateral conventions. As a consequence, international treaties form a more or less loosely knit but in many respects overlapping network of legal norms.

4 With the potential exception of the United Nations Charter there is no general hierarchy that establishes a ranking of treaties, unless a treaty codifies peremptory norms of international law (see paras 9 and 10 below). While treaties can be mutually supportive, their approaches to regulate a certain issue can also lead to contradictions, divergences and conflicts. According to the rule *pacta sunt servanda* a party has to comply with all obligations arising from international agreements to which it has consented. However, if these agreements include contradictions concerning obligations or programmatic approaches or collide on the implementation level, other

rules have to apply to settle which of the relevant agreements has preference over the other or how to coordinate their contents. These two approaches differ significantly. While the establishment of preference necessarily reduces the effect of one of the agreements while upholding the other, the concept of coordination aims at giving the widest possible effect to both treaties (see paras 18–26 below).

2. Definitional Approaches to Conflicts between Treaties

5 There is no universally accepted definition of conflicts between international treaties. The attempt to define a conflict of treaties by equalling it with a conflict of norms implies a restricted and narrow approach. According to Kelsen '[a] conflict of norms occurs if in obeying or applying one norm, the other one is necessarily violated' (at 349). For conflicts between treaties such a definition would limit their occurrence to incompatible obligations for a party arising from two or more bilateral or multilateral treaties. In a schematic construction, a situation of conflict for State A would arise, if State A concluded a treaty with State B with obligation Y, and another treaty with State C with obligation Z, and Z cannot be complied with without breaching Y and vice versa. Although one can think of abstract conflicts between treaties when comparing their contents, the actual conflict only arises if one State is party to both colliding agreements. Only in this case is the addressee of the treaties' obligations, the party, faced with a situation that may lead to the breach of the *pacta sunt servanda* rule with regard to one of the conflicting agreements, because the party is unable to comply with both treaties simultaneously.

6 A strict approach to the definition of conflicts between treaties, however, is too limited to take account of the varying degree of contradictions between treaty provisions and their effect on the coherence of international law. On the one hand the incompatibility of treaty provisions need not necessarily result in incompatibility on the implementation stage, and on the other hand conflicts can materialize at the implementation level, although the treaty provisions themselves are not incompatible. It is the latter category of conflicts that supposedly forms the majority of divergences between agreements, because such contradictions are less obvious at the time of the adoption of an agreement. The difficulty of quickly detecting contradictions is increased by the fact that obligations arising from international agreements are often worded in vague terms that require interpretation before they can be implemented, notwithstanding the fact that the need for interpretation may also offer a tool for harmonization, once a potential contradiction has been discovered. While they do not establish incompatible obligations at first sight, contradictions that arise at the stage of interpretation and implementation may just as well lead to deficits concerning the treaties' effectiveness that are comparable to incompatibilities. Such conflicts in a wider sense may even have much greater potential to hamper coherence in international law by their quantity than the relatively few cases of true incompatibilities. Consequently, a tendency in recent legal writing on the issue differentiates between conflicts in the strict sense, ie incompatibilities, on the one hand, and programmatic conflicts in a wider sense, on the other.

B. Historical Evolution of Legal Rule

1. General

7 The issue of conflicts of norms in international law has experienced a renaissance in legal writing in recent years. In 2002 the International Law Commission (ILC) decided to include the issue 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' into their working programme. While the resolution of conflicts between treaties is not the only issue on the ILC's agenda concerning the issue of fragmentation, agreed areas of further study concern issues inseparably linked to this question: inter alia the function and scope of the *lex specialis derogat legi generali* ('*lex specialis*') rule, the application of successive treaties according to Art. 30 Vienna Convention on the Law of Treaties (1969) ('VCLT'), the modification of

multilateral treaties between certain parties only and hierarchy in international law.

8 The recent interest in the issue is due to the significant proliferation of at least partially overlapping multilateral treaties and, particularly, the surfacing of divergences between the worldwide multilateral trading system under the World Trade Organization (WTO) and, for example, international approaches to protect the environment (Trade and Environment). However, colliding norms derived from two or more treaties are no new phenomenon in international law. The issue has already been the subject of the writings of Grotius (*De jure belli ac pacis libri tres* [JB Scott (ed), Oceana New York 1964 vol II Translation] book II chapter XVI secs XXVIII to XXIX); Pufendorf, *De Jure Naturae et Gentium Libri Octo* [CH Oldfather and WA Oldfather (eds) Clarendon Press Oxford 1934 vol II Translation] book V chapter XXII para 23); and de Vattel (*The Law of Nations or the Principles of Natural Law* [JB Scott (ed), Carnegie Institution of Washington Washington 1916 vol III Translation] book II chapter XVII paras 311–22). A fuller treatment of the issue was later, ie until the middle of the 20th century, provided by Rousseau, Jenks and Aufricht before the issue was taken up again in the last 20 years, eg by Zuleeg, Czapliński and Danilenko, and Mus. In the context of the historical evolution of rules dealing with conflicts between international treaties one must differentiate between three broader issues: the establishment of a rudimentary hierarchy of norms due to the acceptance of peremptory norms of international law; the significance of the conclusion of the VCLT; and the relevance of rules derived from domestic law, eg the *lex posterior derogat legi priori* ('*lex posterior*') rule.

2. Hierarchies of Norms in International Law

9 According to a hierarchical principle a treaty of a higher legal rank prevails over all lower ranking treaties irrespective of temporal considerations concerning the conclusion of the treaty or its entry into force (Treaties, Conclusion and Entry into Force). In general, the law of treaties does not envisage a hierarchy of agreements by attaching a higher rank to certain types of treaties. However, the principle cannot be totally dismissed from international law either. A hierarchical element evolved from the idea of a public law of Europe as established by general treaty settlements in the wake of major wars. Whether the UN Charter by virtue of its Art. 103 or with respect to its normative and constitutional content deserves the attribution of a higher legal value and consequently a higher rank in comparison to all other existing and future treaties, is disputed in international law. While Art. 103 UN Charter together with Art. 30 (1) VCLT may be viewed as indicators of a higher rank of the UN Charter, one may also conclude that Art. 103 UN Charter is merely a particularly far-reaching conflict clause without significance for the legal rank of the UN Charter as such. But the recognition of the concept of peremptory legal norms as a category of international law with a higher rank introduced at least a rudimentary hierarchical element into the structure of international law.

10 The VCLT established the notion of a higher ranking international law for the law of treaties by the adoption of its Arts 53 and 64 (Rosenne 281–88). The significance for conflicts between two or more treaties is, however, relatively small, because the group of norms with a recognized *ius cogens* status only comprises the most fundamental prohibitions in international law. Although the relevance of these prohibitions for the conclusion of new treaties shall not be diminished, it only gains significance for the resolution of conflicts between treaties if one treaty codifies such a compulsory rule and another treaty establishes divergent obligations. Such a conflict must be solved in favour of the treaty codifying a peremptory norm in accordance with Art. 53 VCLT. From this it follows that, for example, an international treaty interfering with the general prohibition of the use of force, which is considered a peremptory norm, is void. This conclusion must be drawn irrespective of the recognition of a higher legal rank for the UN Charter, because avoidance is the legal consequence of Arts 53 and 64 VCLT and not of the breach of Art. 2 (4) UN Charter (concerning the legal consequences of a breach of Art. 103 UN Charter see also Treaties, Conflict Clauses).

3. The Vienna Convention on the Law of Treaties

11 The central provision for resolving conflicts between treaties is Art. 30 VCLT. According to Aust and others this article codifies customary law (Aust 181).

12 When the VCLT was drafted, the issue of resolving conflicts between international treaties was discussed intensively, notwithstanding that in the end it found only fragmented regulation. While Lauterpacht, as Special Rapporteur of the ILC, favoured the invalidity of the later colliding treaty (ILC SR Lauterpacht Report 137–41 and Second Report 133–39), Fitzmaurice stressed the concept that both treaties were valid but applicability depended upon whether a party had joined the later treaty or was a party only to the earlier agreement (ILC Third Report 41–45). Consequently, the *lex prior derogate legi posteriori* ('*lex prior*') approach was replaced by a principle of relative validity based upon the *lex posterior* maxim. The drafting history of Art. 30 VCLT implies further that interpretation as a means to solve conflicts was originally preferred over the *lex posterior* rule. In Special Rapporteur Waldock's first draft proposal there was no explicit mentioning of derogation. The relevant passage read: 'In any such case the conflict shall be resolved on the basis of the general principles governing the interpretation and application of treaties' (ILC SR Waldock Second Report 53).

13 The provisions for the solution of conflicts offered by Art. 30 VCLT are not explicitly restricted to treaties with incompatible obligations, although this was the common understanding of conflicts at the time of its drafting. According to the heading of the article, it refers only to successive treaties relating to the same subject-matter. It is not quite clear however, how the element 'relating to the same subject matter' is to be defined in this context. Sinclair expressed the opinion that the resolution of conflicts between successive treaties dealing with the same subject-matter is 'a particularly obscure aspect of the law of treaties' (at 93). One possibility is to conclude that if two treaties collide they must necessarily relate to the same subject-matter, because otherwise there can be no cause for a collision. Yet, with a view to concrete examples for potential collisions between treaties, eg in the trade and environment context, one would not normally conclude that a free trade agreement and a multilateral environmental agreement establishing trade sanctions were two treaties relating to the same subject-matter, because a trade restriction in an environmental treaty is just one mechanism to pursue its aims and not its object and purpose. A common interpretation of the provision understands it in the sense that Art. 30 VCLT shall not apply when a general treaty contradicts a particular provision of an earlier agreement. Yet, this restrictive understanding does not define any further what constitutes the subject-matter of a treaty, when a *lex specialis* relationship is irrelevant.

4. Evolution and Application of General Maxims

14 Maxims originally derived from municipal legal orders such as the principle of *lex posterior*, *lex specialis* and *prior in tempore, potior in iure* have found certain acceptance in international law as potential mechanisms to solve conflicts, although their applicability is also subject to criticism. Despite the fact they have been considered general principles of law, their nature as axioms of legal logic has been denied by many writers.

15 The Permanent Court of International Justice (PCIJ) relied upon a presumption based upon the *lex posterior* rule that the later treaty supersedes the earlier in the case of incompatible provisions inter alia in one of the Mavrommatis Concessions Cases, namely the 1924 *Mavrommatis Palestine Concessions* case (at 31) and in the *Jurisdiction of the European Commission of the Danube between Galatz and Braila Advisory Opinion* (at 23). It found recognition in Art. 22 Harvard Draft Convention on the Law of Treaties and was introduced into the VCLT in Arts 30 (3) and (4).

16 According to the *lex specialis* rule preference is given to the special provision in the case of a collision between a general and a special treaty provision. The inclusion of this maxim into international law goes back to Grotius. While it is a common principle in domestic law to specify

preference of one of two norms of the same legal rank, its value is questioned in international law. The VCLT, while to some extent relying upon the *lex posterior* maxim in Art. 30, has not made any mention of the *lex specialis* rule. Although the cases in which this rule applies may be limited, the applicability of the international humanitarian law (Humanitarian Law, International) derived from those treaties regulating the *jus in bello* is founded on their speciality for the given situation.

17 A general rule according to which the prior treaty has preference over the later (*lex prior*) has not found general acceptance in international law. Although, in principle, parties can agree not to conclude later contradicting treaties and, hence, give priority to the earlier agreement, this intent must be included into a conflict clause to give preference to the earlier agreement in the case of a conflict. That an earlier treaty remains applicable in regard to those who are parties to the earlier but not to the later treaty is not so much a result of a *lex prior* but of the *pacta tertiis nec nocent* ('*pacta tertiis*') rule. While de Vattel and other early writers suggested that in cases of colliding treaties with diverging membership the *lex prior* rule leads to incapacity to conclude a later conflicting treaty, this view was neither confirmed by judicial precedent nor by the conclusion of the VCLT.

C. Current Legal Situation

1. General

18 The resolving of conflicts according to a hierarchical principle is only of minor significance for the majority of diverging treaty provisions. While the fate of a treaty contravening *ius cogens* is its nullity (Nullity in International Law), derogation of treaty provisions does not as such affect the validity of agreements but abrogates their applicability for a specific party in a specific situation. Rules such as Art. 30 VCLT and other principles of derogation or harmonization only apply if both treaties are in force and operation. If either of the colliding agreements has been terminated or if its operation has been suspended by the implication under Art. 59 VCLT, there is no room and no necessity for conflict resolution.

19 In principle, current approaches to solve conflicts between treaties differentiate between two concepts: derogation on the one hand and coordination of norms on the other hand. The relevant approaches to solve conflicts between treaties are somewhat related to the definition of conflicts (see paras 5 and 6 above). If the notion of conflict is restricted to incompatibilities, derogation is the only viable mechanism to resolve the situation, once interpretation fails to resolve the situation of incompatibility. While the result of derogation as such is clear, the identification and applicability of derogation norms may be difficult. If conflicts are defined by a broader approach, attempts to coordinate the conflicting norms by seeking a compromise that upholds both regulations as far as possible, while overcoming the contradictions between them, may be the more appropriate methodological approach.

2. Interpretation

20 Interpretation must be the first tool to be applied to any conflict between treaties because even strict conflicts may be resolved if the obligations can be interpreted in a manner such that they are compatible with each other. The coordination of legal rules of a lower with those of a higher rank by the means of a harmonizing interpretation is known from national legal orders, eg by interpreting acts of parliaments in accordance with the constitution, and from the law of the European Union regarding domestic legislation of the Member States that is interpreted in a way that gives preference to the objective of the supranational legal act (European Community and Union Law and Domestic [Municipal] Law). In international law, however, the formal equality of legal rules derived from international treaties prefers a form of harmonizing interpretation that attempts to settle the conflict while giving the widest possible degree of application to both colliding provisions.

Harmonizing interpretation has been considered a feasible instrument to prevent and solve conflicts since the time of the writings of Grotius and de Vattel. According to Rousseau such 'adaptation' is an autonomous mechanism to harmonize diverging treaties (at 164). It is a prerequisite of the establishment of a coherent international legal order that diverging international treaties are to be interpreted in a way to safeguard their compatibility. In comparison to derogation the application of both treaties to their maximum effect is preferable. Yet, it is questionable whether the law of treaties offers the necessary instruments to achieve such an objective.

21 A harmonization of treaties by adopting a certain interpretation that prevents contradictions must be binding for all parties; otherwise the treaty is interpreted and applied in different ways by its different parties which can considerably diminish its effectiveness. However, if a treaty is modified by adapting its interpretation to the provisions of another treaty, the consent of all parties is essential. Otherwise a breach of the *pacta tertiis* rule can be assumed in relation to those parties to the one but not to both diverging agreements.

22 While the VCLT establishes certain rules of interpretation it does not mention a harmonizing interpretation in the case of conflict. Although Art. 31 (3) (a) VCLT allows the consideration of later agreements between the parties to function as a means of interpretation, this mechanism cannot be applied if the parties to the two agreements differ. The basic rule of interpretation sets further limits to employ a harmonizing interpretation as a tool to reconcile diverging treaties. According to the basic rules on treaty interpretation a treaty is only subject to interpretation if its wording is unclear. If two agreements in clear terms contradict each other, technically, there is no room for treaty interpretation. While one may argue that the parties to a treaty have the authority to interpret the treaty in a different way irrespective of a clear wording of a provision, it is doubtful whether it is necessary to blur the distinction between treaty interpretation on the one hand and the modification of a treaty by formal amendment on the other hand. It is without doubt that parties can adapt a treaty according to the procedure agreed upon by the parties themselves or the subsidiary rules of the VCLT on the amendment of treaties in Arts 39–41 in order to reconcile it, but in many cases this would go further than mere treaty interpretation.

23 Lately Art. 31 (3) (c) VCLT has gained attention as a means to prevent or solve conflicts by 'systemic integration' of norms. This rule provides that in the interpretation of a treaty norm one should take into account any other relevant rules of international law 'applicable in the relations between the parties'. In addition to difficulties in defining whether rules stemming from two or more different treaties must be applicable only to the parties to a specific dispute or whether all parties to all relevant agreements must coincide, the main general restrictions remain the same: if two treaty norms contradict each other in clear terms there is strictly speaking no room for systemic integration based upon interpretation.

3. Conflict Clauses

24 One viable approach to prevent or settle conflicts between different international agreements frequently used in current treaty-making practice is to include conflict clauses into the texts of treaties that clarify which of two conflicting agreements is applicable for a contracting party. In this case the applicable derogation norm is incorporated into either of the two conflicting treaties. For successive treaties relating to the same subject-matter Art. 30 (2) VCLT explicitly provides for such a solution. If both agreements lack conflict clauses or if the conflict clauses contradict one another, either Arts 30 (3) and (4) VCLT as specific codifications of the *lex posterior* maxim can function as derogation norm or the application of a general *lex posterior* or *lex specialis* rule must be taken into consideration.

4. Relative Validity

25 Under current international law there should be no difficulty if two successive bilateral treaties

between the same parties are inconsistent with one another. Even the case of diverging multilateral agreements is relatively easy to approach, if the treaties have the same parties and concern the same subject-matter. According to literature as well as national court decisions, there exists a general rule that if two multilateral treaties on the same subject-matter exist and the parties to these treaties intended to update or improve their legal relations by concluding a new agreement, the later treaty supersedes the earlier one (*lex posterior* rule). Art. 30 (3) VCLT is based upon this consideration. For the problematic cases, eg conflicts between treaties not easily qualified as relating to the same subject-matter, this rule fails to offer feasible results because the presumption of an intended improvement or updating cannot be upheld. While it flows from State sovereignty that the parties to a treaty can abrogate or revise it by later agreement, a general presumption in favour of the later treaty cannot be established, if the treaties concern different issues and the parties to them overlap only partially. In regard to those States that are only party to the earlier but not to the later treaty the principle of *pacta tertiis* (Treaties, Third-Party Effect) prohibits the termination of their rights and obligations by an agreement to which they have not consented. Consequently, a maxim of *lex posterior* can only be applicable as concerns either treaties the parties to which are identical or in the form of *inter se* agreements only between the parties to the later treaty, if this is allowed by the earlier one. This result is codified in Art. 30 (4) (b) VCLT. The relative validity following from such an approach does not solve the principal dilemma of a breach of the *pacta sunt servanda* rule if the fulfilment of two incompatible obligations is owed by a party.

5. Specific Difficulties

26 A significant problem concerning the application of the *lex posterior* rule, which is the guiding principle of conflict resolution according to the provisions of the VCLT, is the determination which of two treaties is the earlier and which the later. Since conflicts between treaties are not to be considered on an abstract level but with a view to the parties that are bound by two diverging agreements, different temporal elements can be decisive: the date of the adoption of a treaty, its entry into force, or the date of entry into force for the relevant party, if it acceded later to an already existing treaty. The VCLT has left this question open. Usually, conflict clauses referring to existing treaties do not specify the issue either. There seems to be a tendency to consider the date of the adoption of a treaty as decisive for establishing a temporal ranking of agreements.

D. Significance

27 Conflicts between treaties, particularly if defined in a broad sense, are a common phenomenon in international law. The prevention or solution of conflicts between treaties is crucial for establishing at least elementary coherence of norms in international law. Such coherence provides for enhanced clarity and effectiveness of international law derived from treaties. The hierarchical principle is only of limited relevance, while the *lex posterior* principle as codified in the VCLT suffers from the lack of clarity concerning the application of Art. 30 VCLT. The principle of relative validity of treaties may provide for some reliability for single parties concerning their rights and obligations towards others. However, it is not suitable to provide for substantial coordination of treaties.

28 The main feasible tools to address conflicts are the harmonizing interpretation of treaties and conflict clauses. Generally, a harmonizing interpretation should be preferred to derogation, since, in principle, coordination by interpretation respects the aims and objectives of both colliding agreements to the greatest possible extent. Yet, interpretation of treaties faces limitations in regard to the *pacta tertiis* rule and the prerequisites of interpretation: the necessary lack of clarity of a norm. It is essential that the harmonization of treaties by an adaptation of the relevant treaties in the form of amendments must be based upon close cooperation between the parties to all relevant treaties. Closer cooperation between states and between treaties' institutions, eg secretariats, conferences of the parties, or subsidiary bodies, may promote the reconciliation of treaties to

prevent programmatic conflicts and conflicts arising on the implementation level. However, in the absence of formal institutional mechanism with legal effects, this is a merely a political and not a legal approach to conflict resolution.

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STATUTE OF THE COURT

The Statute of the International Court of Justice is annexed to the Charter of the United Nations, of which it forms an integral part. The main object of the Statute is to organize the composition and the functioning of the Court.

The Statute can be amended only in the same way as the Charter, i.e., by a two-thirds majority vote in the General Assembly and ratification by two-thirds of the States (Art 69).

Should the ICJ consider it desirable for its Statute to be amended, it must submit a proposal to this effect to the General Assembly by means of a written communication addressed to the Secretary-General of the United Nations (Art 70). However, there has hitherto been no amendment of the Statute of the Court.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

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Article 1

The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

CHAPTER I - ORGANIZATION OF THE COURT

Article 2

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.
2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.
2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.
3. The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

Article 5

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

Article 6

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7

1. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

Article 8

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

Article 9

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 10

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

3. In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

Article 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Article 12

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

3. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

Article 13

1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for transmission to the Secretary-General. This last notification makes the place vacant.

Article 14

Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall,

within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

Article 15

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 16

1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.
2. Any doubt on this point shall be settled by the decision of the Court.

Article 17

1. No member of the Court may act as agent, counsel, or advocate in any case.
2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.
3. Any doubt on this point shall be settled by the decision of the Court.

Article 18

1. No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions.
2. Formal notification thereof shall be made to the Secretary-General by the Registrar.
3. This notification makes the place vacant.

Article 19

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

Article 21

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.
2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

Article 22

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.
2. The President and the Registrar shall reside at the seat of the Court.

Article 23

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.
2. Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.
3. Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

Article 24

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.
2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.
3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Article 25

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.
2. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may

provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. A quorum of nine judges shall suffice to constitute the Court.

Article 26

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this article if the parties so request.

Article 27

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

Article 28

The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.

Article 29

With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.

Article 30

1. The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

2. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

Article 31

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

Article 32

1. Each member of the Court shall receive an annual salary.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for every day on which he acts as President.

4. The judges chosen under Article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions.

5. These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.

6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.

7. Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded.

8. The above salaries, allowances, and compensation shall be free of all taxation.

Article 33

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.

CHAPTER II - COMPETENCE OF THE COURT

Article 34

1. Only states may be parties in cases before the Court.
2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.
3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

1. The Court shall be open to the states parties to the present Statute.
2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.
3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - a. the interpretation of a treaty;
 - b. any question of international law;
 - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
 - d. the nature or extent of the reparation to be made for the breach of an international obligation.
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.
4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

CHAPTER III - PROCEDURE

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.
2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the

decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

Article 40

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 42

1. The parties shall be represented by agents.

2. They may have the assistance of counsel or advocates before the Court.

3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 43

1. The procedure shall consist of two parts: written and oral.

2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.

3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

4. A certified copy of every document produced by one party shall be communicated to the other party.

5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

Article 44

1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.

2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 45

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

Article 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

Article 47

1. Minutes shall be made at each hearing and signed by the Registrar and the President.

2. These minutes alone shall be authentic.

Article 48

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 49

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Article 50

The Court may, at any time, 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.

Article 51

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Article 52

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Article 53

1. 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.
2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Article 54

1. When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.
2. The Court shall withdraw to consider the judgment.
3. The deliberations of the Court shall take place in private and remain secret.

Article 55

1. All questions shall be decided by a majority of the judges present.
2. In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

Article 56

1. The judgment shall state the reasons on which it is based.
2. It shall contain the names of the judges who have taken part in the decision.

Article 57

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 58

The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 61

1. An application for revision of a judgment may 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.
2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
4. The application for revision must be made at latest within six months of the discovery of the new fact.
5. No application for revision may be made after the lapse of ten years from the date of the judgment.

Article 62

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.

Article 63

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Article 64

Unless otherwise decided by the Court, each party shall bear its own costs.

CHAPTER IV - ADVISORY OPINIONS

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.
2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.
2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.
3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.
4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 67

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Article 68

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

CHAPTER V - AMENDMENT

Article 69

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

Article 70

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.

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Part Three Statute of the International Court of Justice, Ch.II Competence of the Court, Article 38**Alain Pellet**

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(p. 731) Article 38

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. **international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;**
- b. **international custom, as evidence of a general practice accepted as law;**
- c. **the general principles of law recognized by civilized nations;**
- d. **subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.**

(2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

(1) La Cour, dont la mission est de régler conformément au droit international les différends qui lui sont soumis, applique:

- a. **les conventions internationales, soit générales, soit spéciales, établissant des règles expressément reconnues par les Etats en litige;**
- b. **la coutume internationale comme preuve d'une pratique générale, acceptée comme étant le droit;**
- c. **les principes généraux de droit reconnus par les nations civilisées;**
- d. **sous réserve de la disposition de l'Article 59, les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations, comme moyen auxiliaire de détermination des règles de droit.**

(2) La présente disposition ne porte pas atteinte à la faculté pour la Cour, si les parties sont d'accord, de statuer *ex aequo et bono*.

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A. Introduction—The Function of the Court and Applicable Law

1 Few provisions of treaty law, if any, have called for as many comments, debates, criticisms, praises, warnings, passions, as Art. 38 of the Statute. There are many ways to consider this famous—or infamous—provision. It can be seen as a superfluous and useless clause, at best a clumsy and outmoded attempt to define international law, at worst (p. 734) a corset paralysing the world's highest judicial body. It can also be analysed as a most successful and concise description of both the Court's mission and the law it must apply and as providing helpful guidance for avoiding *non liquet* as well as fantasy and arbitrariness in the interpretation and implementation of the rules of law.

References

2 It is the view of the present writer that Art. 38 deserves neither over-praise nor harsh indignity.² It would be disingenuous to make it a kind of revealed truth rigidly defining the frontiers of international law and even the Court's function. But, if interpreted from a dynamic perspective, it probably points to a rather fortunate middle way between a mechanical application of the rules of law (a difficult task indeed in the international sphere) and the dangers of the 'gouvernement des

another.⁷¹⁹ However, without referring expressly to Art. 38, both (p. 834) Courts have, in fact, applied general principles; individual judges have shown themselves less shy in this respect; and States have invoked general principles during the pleadings. On the basis of this material, it is possible to clarify the meaning of Art. 38, para. 1 (c) and to understand why the Court so rarely resorted to this provision.⁷²⁰

 References

254 While the intentions of the drafters of the Statute are less obscure than sometimes alleged, international lawyers have never reached agreement on the definition of the general principles mentioned in Art. 38. There is, however, little doubt that they are:

- unwritten legal norms of a wide-ranging character and
- recognized in the municipal laws of States;
- moreover, they must be **transposable** at the international level.

a) A Much Debated Definition—General Principles Recognized in *foro domestico*

255 As aptly observed by Professor Mendelson, ‘although there is quite a debate among legal theorists as to the difference and hierarchical relation between rules and principles, none of this finds any reflection in the utterances of the ICJ, which tends to treat the two terms as synonymous’.⁷²¹ In *Gulf of Maine*, the Chamber of the Court observed that:

the association of the terms ‘rules’ and ‘principles’ is no more than the use of a dual expression to convey one and the same idea, since in this context ‘principles’ clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term ‘principles’ may be justified because of their more general and more fundamental character.⁷²²

256 However, there can be no doubt that, when associated with ‘general’ the word ‘principle’ implies a wide-ranging norm.⁷²³ And, similarly, when associated with ‘international law’, it cannot be put into doubt that general principles are of a legal nature. In this respect, the *travaux* clearly show that the drafters of the Statute wished judges to be guided by legal considerations. That the roots of such principles lie in the municipal law of States⁷²⁴ is meant as a guarantee that those principles do correspond ‘to the dictates of the legal conscience of civilised nations’.⁷²⁵ This is also confirmed by the fact that it was precisely to make a clear (p. 835) distinction between law on the one hand and ‘justice’ (or equity in the broad sense) on the other that then para. 5 (now para. 2) was introduced by the League of Nations.⁷²⁶

 References

257 Moreover, as seen previously, the Court itself has made an (intellectually) clear distinction between legal rules and ‘moral principles’ which can be taken into account ‘only in so far as these are given a sufficient expression in legal form’.⁷²⁷ It might be true that ‘in Art. 38, para. 1 (c) some natural law elements are inherent’,⁷²⁸ but these ‘elements’ have to be ‘legalized’ by their incorporation into the legal systems of States. This requirement of recognition of the general principles *in foro domestico* is the criterion which differentiates the principles of Art. 38, para. 1 (c) from both equitable or moral principles and from the general principles of international law.

258 In the *Lotus case*, the PCIJ pretended to limit international law to conventions and customs emanating from the ‘free will’ of States and considered that ‘the words “principles of international law”, as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States’.⁷²⁹ This might have been an attempt, by a Court led by blind adherence to voluntarism,⁷³⁰ to deprive the general principles mentioned in para. 1 (c) of any

GENERAL PRINCIPLES OF LAW

as applied by

INTERNATIONAL COURTS AND TRIBUNALS

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however, custom is used in a strict sense, being confined to what is a general practice among States accepted by them as law. General practice among nations, as well as the recognition of its legal character, is therefore required. It should be observed that the emphasis in the definition of what constitutes a custom lies not in the rule involved in the general practice, but rather in its being part of objective law as a whole.

In the definition of the third source of international law, there is also the element of recognition on the part of civilised peoples but the requirement of a general practice is absent. The object of recognition is, therefore, no longer the legal character of the rule implied in an international usage, but the existence of certain principles intrinsically legal in nature. This part of international law consists in the general principles of that social phenomenon common to all civilised societies which is called law. Principles are to be distinguished from rules.

"A rule . . . is essentially practical and, moreover, binding; there are rules of art as there are rules of government, while a principle expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence."¹

This part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short of Law. Thus Lord Phillimore, who proposed the formula, explained that by general principles of law he meant "maxims of law."² But how is it possible to ascertain whether a given principle is a principle of law and not of another cognate social discipline, such as religion or morality? The recognition of its legal character by civilised peoples supplies the necessary element of determination. Lord Phillimore also explained that the

customary international law (*Procès-verbaux*, pp. 295-311). But his conception of custom was that of a Common Law (*ibid.*, p. 316; Phillimore, "Scheme for the P.C.I.J.," 6 *Grotius Transactions* (1920), p. 89, at p. 94), which in reality resembled natural law (*Procès-verbaux*, p. 318). Cf. also La Pradelle (*ibid.*, p. 335); Raestad, "'Droit coutumier' et principes généraux en droit international," 4 *A.S.J.G. (N.T.I.R.)* (1933), p. 62, at p. 62.

¹ Ital.-Ven. M. C. C. (1903): *Gentini Case, Ven.Arb. 1903*, p. 720, at p. 725, the Umpire quoting Bourguignon & Bergerol's *Dictionnaire des Synonymes*. Transl: See *infra*, p. 376.

² *Procès-verbaux*, p. 335.

PART TWO

THE PRINCIPLE OF GOOD FAITH

THE sole Arbitrator in the *Metzger & Co. Case* (1900) held that: "It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements."¹ There was little doubt in the mind of the Arbitrator as to the binding character of the principle of good faith upon individuals living under the rule of law and he held that it was equally binding upon nations. The Permanent Court of Arbitration, in the *Venezuelan Preferential Claims Case* (1904), also expressly affirmed that the principle of good faith "ought to govern international relations."² The sole Arbitrator in the Germano-Lithuanian Arbitration (1936) held that: "A State must fulfil its international obligations bona fide."³ The principle of good faith is thus equally applicable to relations between individuals and to relations between nations. Indeed, the Greco-Turkish Arbitral Tribunal considered the principle of good faith to be "the foundation of all law and all conventions."⁴ It should, therefore, be the fundamental principle of every legal system.

What exactly this principle implies is perhaps difficult to define. As an English judge once said, such rudimentary terms applicable to human conduct as "Good Faith," "Honesty," or "Malice" elude *a priori* definition. "They can be illustrated but not defined."⁵ Part Two will be an attempt to illustrate, by means of international judicial decisions, the application of this essential principle of law in the international legal order.

¹ U.S./Haiti, U.S.F.R. (1901), p. 262, at p. 271.

² Germany, Great Britain, Italy/Venezuela *et al.*, 1 H.C.R., p. 55, at p. 60.

³ *Award* (1937) 3 UNRIAA, p. 1719, at p. 1751. (Transl.)

⁴ *Megalidis Case* (1928) 8 T.A.M., p. 386, at p. 395.

⁵ Lord Hobhouse (England, House of Lords: *Russell v. Russell* [1897] A.C. p. 395, at p. 436).

clausula rebus sic stantibus is founded on the principle of good faith and is recognised by international law.⁶³

Finally, the principle of good faith requires a party to refrain from abusing such rights as are conferred upon it by the treaty.⁶⁴

E. Denunciation of Treaties

Where a party is free to denounce a treaty at any time, it should not do so immediately on learning that the other party wishes to invoke the treaty; for otherwise the treaty would, contrary to the true intention of the parties, be deprived of all practical effect. If, however, this right does not exist except at periodic intervals, a party may denounce the treaty at the end of a period even if it is at the same time notified that the other party wishes to invoke the treaty.⁶⁵

Good faith in contractual relations thus implies the observance by the parties of a certain standard of fair dealing, sincerity, honesty, loyalty, in short, of morality, throughout their dealings. All these qualities may escape precise definition, but they may be considered as inherent in, or at least perceptible to, every common man. International law applies this standard in treaty relations between States to the extent described above, much as municipal law in contractual relations between individuals. In particular, all systems of law in accordance with the principle of good faith prescribe that promises should be scrupulously kept so that the confidence that may reasonably be placed upon them should not be abused. The importance

⁶³ Cf. D.O. by Alvarez in I.C.J.: *Competence of Assembly regarding Admission to the U.N.* (1950) Adv.Op., *ICJ Reports, 1950*, p. 4, at p. 17; also in *Anglo-Iranian Oil Co. Case* (Jd.) (1952) *ICJ Reports, 1952*, p. 93, at p. 126; D.O. by Winiarski in I.C.J.: *Interpretation of Peace Treaties* (1st Phase) (1950) Adv. Op., *ICJ Reports, 1950*, p. 65, at p. 94. Both learned judges, it is submitted, however, failed to distinguish the two different meanings of the *clausula*, wherein lies the main flaw in their argument. See further *supra*, pp. 113 *et seq.* and note 38.

⁶⁴ Peruv.-U.S. Cl.Com. (1863): *Sartori Case*, 3 *Int.Arb.* 3120, at p. 3122: "The honour and interests of the two republics represented in the joint commission require them to give proofs of the good faith with which each of the two countries fulfils the stipulations of the public treaty that binds them and requires that neither government shall allow the citizens so to abuse the protection and guarantees conceded to them by the treaty as to consider them a species of immunity under which they may infringe the laws."

⁶⁵ PCIJ: *Electricity Co. of Sofia and Bulgaria Case* (Prel.Obj.) (1939), D.O. by Anzilotti, A/B. 77, pp. 97-8; Cf. Ser. C. 88, pp. 430-1.

is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law. The exact line dividing the right from the obligation, or, in other words, the line delimiting the rights of both parties is traced at a point where there is a reasonable balance between the conflicting interests involved. This becomes the limit between the right and the obligation, and constitutes, in effect, the limit between the respective rights of the parties. The protection of the law extends as far as this limit, which is the more often undefined save by the principle of good faith. Any violation of this limit constitutes an abuse of right and a breach of the obligation—an unlawful act. In this way, the principle of good faith, by recognising their interdependence, harmonises the rights and obligations of every person, as well as all the rights and obligations within the legal order as a whole.

D. Abuse of Discretion

In the complexities of human society, either of individuals or of nations, law cannot precisely delimit every right in advance. Certain rights may indeed be rigidly circumscribed, as, for instance, the right of self-defence in the territory of a friendly State. This right is limited to the taking of the only available means of self-defence imperatively demanded by the circumstances.²⁹ But, in a great number of cases, the law allows the individual or the State a wide discretion in the exercise of a right. Thus we have seen, when examining the principle of self-preservation, that the State enjoys a wide discretion in the exercise of its right of expropriation and requisition, its right to admit and expel aliens, and, generally speaking, all its rights of self-preservation in territory subject to its authority. This discretion extends to the determination of the nature, extent and duration of the State's requirements and the methods best calculated to meet the various contingencies.³⁰

But wherever the law leaves a matter to the judgment of the person exercising the right, this discretion must be exercised in good faith, and the law will intervene in all cases where this

²⁹ *Supra*, pp. 83 *et seq.*

³⁰ See *supra*, pp. 67-68, and references therein.

discretion is abused.³¹ As Judge Azevedo said in one of his individual opinions:—

“ Any legal system involves limitations and is founded on definite rules which are always ready to reappear as the constant element of the construction, whenever the field of action of discretionary principles, adopted in exceptional circumstances, is overstepped. This is a long-established principle, and has served, during centuries, to limit the scope of the principle of *qui suo jure utitur neminem laedit*.”³²

Thus in cases concerning the expulsion of aliens, an international tribunal would normally accept as conclusive the reasons of a serious nature adduced by the State as justifying such action.³³ It would, however, regard as unlawful measures of expulsion those which are arbitrary,³⁴ or accompanied by unnecessary hardship.³⁵ Where private property is taken for public use, although it is primarily for the State to decide what are its needs, as well as their extent and duration,³⁶ international tribunals would intervene when the need is plainly not one of a public character,³⁷ or when the property is retained clearly beyond the time required by the public need.³⁸ Furthermore, while it is left to the State conducting military operations to determine what are military necessities, international tribunals are entitled to intervene in cases of manifest abuse of this discretion, causing wanton destruction or injury.³⁹ Again, while a State taking reprisals against another is not bound to relate its measures closely to the offence,⁴⁰ it has been held that “ reprisals out of all proportion to the act which had prompted them ought certainly to be considered as excessive and hence unlawful.”⁴¹

Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which

³¹ See *supra*, p. 68, and references therein.

³² ICJ: *Admission of a State to the U.N.* (1948), *Adv.Op.*, *ICJ Reports, 1947-1948*, p. 57, at p. 80.

³³ *Supra*, pp. 34-35.

³⁴ *Supra*, p. 35, note 9, and p. 36.

³⁵ *Supra*, p. 36.

³⁶ *Supra*, pp. 39, 40-41, 43-45.

³⁷ *Supra*, p. 39.

³⁸ *Supra*, p. 44.

³⁹ *Supra*, pp. 65 *et seq.*

⁴⁰ *Supra*, p. 98.

⁴¹ *Supra*, p. 98.

but may be exercised within the general purposes and principles of the Charter of the United Nations.⁴⁵

But, as was pointed out by some of the dissenting Judges, however circumscribed, the exercise of this discretion is extremely difficult, if not impossible, to control.⁴⁶ For the only result of its exercise is a vote of "yes" or "no," and there is no rule of law which obliges a member, in casting his vote, to give his reasons. Even if the reasons may be gathered from the discussions preceding the vote, a member might change his views between the time of the discussions and the time of the vote. Furthermore, whatever juridical limits may have been set to the type of consideration that may be taken into account, there is no means of verifying whether the reasons advanced during the discussion are genuine and decisive, and, even if they are, whether they are the exclusive ones. As one of the Judges said in an individual opinion "all kinds of prejudices, and even physical repugnance will find a way of influencing the decision, either by an act of the will or even through the action of the subconscious."⁴⁷

It is especially on account of this difficulty of controlling the exercise of discretionary powers that the Judges, whether they were of the opinion that the discretion should be exercised within the limits of Article 4 I or within the wider limits of the general purposes and principles of the United Nations Charter, all agreed in stressing that the discretion inherent in the right to vote must be exercised in good faith.⁴⁸ Good faith in the exercise of the discretionary power inherent in a right seems thus to imply a genuine disposition on the part of the owner of the right to use the discretion in a reasonable, honest and sincere manner in conformity with the spirit and purpose, as well as the letter, of the law. It may also be called a spontaneous sense of duty scrupulously to observe the law. In this present case, there is practically no means of controlling the exercise of the discretion. It is, therefore, essential that it should be possible to place reliance on the State's own sense of respect for the law.

⁴⁵ *Ibid.*, at pp. 91-2, 93, 103, 115.

⁴⁶ *Ibid.*, at pp. 102 *et seq.*, 111 *et seq.*

⁴⁷ Judge Azevedo, *ibid.*, at p. 78.

⁴⁸ *Ibid.*, at pp. 63, 71, 79 *et seq.*, 91, 92, 93, 103, 115.

The duty of protection in both cases was also assimilated by the *Rapporteur* in the Spanish Zone of Morocco Claims (1923) who was likewise of the opinion that the State's obligation was limited by the range of possibility. Speaking of the diligence required of a State in the protection of aliens against banditry, he said:—

“ Here, the question of the degree of vigilance exercised becomes particularly important. Is the territorial State exonerated if it has done what may reasonably be asked of it, taking into account its effective situation? Or is it obliged to guarantee a certain degree of security, being responsible for any incapacity to provide it? Such a view has been upheld and applied to certain States. The correctness of this point of view, however, seems to be highly disputable, and it is far from being accepted by decisions of international tribunals. Writers are clearly against it. In the branch of international law in which the problem of the negligence of the State in preventing acts which eventually prove unlawful under international law has played a particularly important part, namely, the field of neutrality in time of maritime warfare, it has finally been recognised that the State is obliged to exercise only that degree of vigilance which corresponds to the means at its disposal. To require that these means should always measure up to the circumstances would be to impose upon the State duties which it would often not be able to fulfil. Thus, the view that the vigilance required should correspond to the importance of the interests at stake has not been able to prevail. The vigilance which, from the point of view of international law a State is obliged to exercise, may be characterised as a *diligentia quam in suis* applying by analogy a term of Roman law. This rule, conforming to the primordial principle of the independence of States in their internal affairs, actually provides States with the degree of security for their nationals, which they may reasonably expect. As soon as the vigilance exercised falls clearly below this standard in regard to the nationals of a particular State, the latter is entitled to consider itself injured in interests which should enjoy the protection of international law.

“ What has just been said of the diligence required with regard to the general insecurity resulting from the activities of bandits, applies *a fortiori* to two other situations mentioned above, *viz.*, common crime and rebellion. In the first case, a diligence going further than the *diligentia quam in suis* would impose upon the State the obligation to organise a special police force for foreigners, which would certainly extend beyond the compass of recognised

international obligations (apart from cases where it is a question of persons legally entitled to enjoy a special protection). In the second case, that of rebellion, etc., the responsibility is limited because the public authority is faced with exceptional resistance."⁶

When the *Rapporteur* referred to "the view that the vigilance required should correspond to the interests at stake," it would seem that he had in mind *The Alabama Case* (1872) and was ready to disagree with that decision, should it be interpreted as requiring a degree of diligence which is not limited by the State's capacity. When, however, the deliberations leading up to the *Alabama Award* are examined, it will be seen that the *Alabama Tribunal* intended no such requirement.

The *Alabama Award* stated that:—

"The 'due diligence' referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part."⁷

A review of the opinions of the various arbitrators shows that this passage in the Award was directly inspired by the opinion of the presiding Arbitrator, Count Sclopis, who, in his "Opinion on the Question of 'Due Diligence,'" said the following:—

"It is no doubt right to take into consideration a belligerent's requirement's *vis-à-vis* a neutral, but they must not be pushed to the point of hindering the neutral in the normal exercise of his rights, in the organisation of his governmental functions.

"On the other hand, I freely admit that the duties of a neutral cannot be determined by the laws that this Power might have established in its own interest. That would be an easy means to escape from positive responsibilities, which equity recognises and which the law of nations lays down . . .

"It does not seem admissible to me, however, that a belligerent can require a neutral to increase its military strength and its ordinary system of defence in order to discharge its duties of neutrality.

⁶ *Rapport III* (1924) 2 UNRIAA, p. 615, at p. 644. Transl. *Cf. contra, The Montijo* (1875) 2 *Int.Arb.*, p. 1421, at p. 1444. See, however, the comment on *The Montijo Case* by the Umpire of Ital.-Ven. M.C.C. (1903): *Sambiaggio Case, Ven.Arb. 1903*, p. 666, at p. 684.

⁷ 1 *Int.Arb.*, p. 495, at p. 654.

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A. The Drafting of the Provision in the Statute of the Permanent Court of International Justice referring to General Principles of Law

1 References to general principles of law may be found in arbitral decisions concerning international disputes well before the adoption of the Statute of the Permanent Court of International Justice (PCIJ). For instance, in the arbitration between France and Venezuela in the *Antoine Fabiani Case* the arbitrator said that he would apply ‘the general principles of the law of nations on the denial of justice’ and defined those principles as ‘the rules common to most legislations or taught by doctrines’ (at 117). However, only Art. 38 (c) PCIJ Statute gave great prominence to the role that general principles of law may play in international adjudication when it stated that the PCIJ was required to apply the ‘general principles of law recognized by civilized nations’ (Civilized Nations).

2 This wording—which was reproduced in Art. 38 (1) (c) Statute of the International Court of Justice (ICJ)—has given rise to criticism in recent times, since it appears to be based on the dated concept that only certain nations may be rightly called civilized. This criticism, which was voiced especially in Judge Ammoun’s separate opinion in the *North Sea Continental Shelf Cases* (*[Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands]* 132–33), led to a proposal, which was, however, not insisted upon, by Guatemala and Mexico to amend the ICJ Statute by deleting the term civilized (United Nations General Assembly ‘Review of the Role of the International Court of Justice: Report of the Secretary-General’ [15 September 1971] 23–25). More significantly, this inappropriate wording may partly explain why the ICJ has been so far reluctant to refer to specific rules of one or other municipal system, lest it imply that some other systems had to be regarded as less civilized (International Law and Domestic [Municipal] Law).

3 A perusal of the preparatory work of the PCIJ Statute shows that the drafters had different views about what the reference to general principles of law was intended to cover. Baron Descamps, the chairman of the Advisory Committee of Jurists (‘Committee’) from which the text originated, had proposed to include among the rules that the PCIJ would apply ‘the rules of international law as recognized by the legal conscience of civilised nations’ (Permanent Court of International Justice: Advisory Committee of Jurists *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes* 306). As Baron Descamps later explained, he meant by this ‘the law of objective justice, at any rate in so far as it has twofold confirmation of the concurrent teachings of jurisconsults of authority and of the public conscience of civilised nations’ (ibid 324). The United States of America member, E Root, held that this reference was too wide and would have empowered the PCIJ to ‘apply principles, differently understood in different countries’ (ibid 308). In the following debate, Lord Phillimore, the United Kingdom member, maintained that ‘all the principles of common law are applicable to international affairs. They are in fact part of international law’ (ibid 316). E Root then submitted an amended proposal, which referred to ‘the general principles of law recognized by civilised nations’ (ibid 344). This text was adopted by the Committee without change (ibid 567, 584, 605, and 648). In the discussion relating to E Root’s proposal, the Brazilian member, M Fernandes, suggested that the PCIJ should apply ‘those principles of international law which, before the dispute, were not rejected by the legal traditions of one of the States concerned with the dispute’ (ibid 346). On the other hand, in an often quoted passage Lord Phillimore ‘pointed out that the general principles referred to ... were those which were accepted by all nations in foro domestico, such as certain principles of procedure, the principle of good faith (bona fide), the principle of res iudicata, etc.’ (ibid 335). The French member, M de Lapradelle, ‘admitted that the principles which formed the bases of national law, were also sources of international law’ (Sources of International Law); however, he ‘thought it preferable to keep to a simple phrase: such, for example, as “the general principles of law”, without indicating exactly the sources from which the principles should be derived’ (ibid 335–36). These excerpts from the summary records of the debate show that the compromise text adopted by the Committee covered a division of opinions, especially on the question whether a general principle was to be regarded as part of international

law only because it was already present in municipal systems. The Committee's report did not provide any additional explanation (ibid 729), nor was there any substantial discussion on the principles of law in the debates that led to the formal adoption of the PCIJ Statute by the League of Nations (*Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*).

B. The Reference to General Principles of Law in the Statute of the International Court of Justice

4 As was noted above (para. 2), in Art. 38 (1) (c) ICJ Statute one finds the same wording as in Art. 38 (c) PCIJ Statute. No discussion took place at the San Francisco Conference about the reference in the ICJ Statute to 'general principles of law recognized by civilized nations'.

5 The chapeau of Art. 38 PCIJ Statute underwent an expansion. While it originally read: 'The Court shall apply', it now states: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply'. This change had the purpose of stressing the Court's function with regard to international law (see the statement of Al-Faray as Rapporteur of Committee IV/1, United Nations Information Organization [ed] *Documents of the United Nations Conference on International Organization: San Francisco, 1945* [United Nations Information Organization New York 1945] vol 13 *Commission IV: Judicial Organization* 427). It was not intended to affect the meaning of any of the references to the various sources listed in Art. 38 ICJ Statute.

6 GI Tunkin argued that

the amendment invalidates the understanding of Art. 38(1)(c) that was prevailing in the Commission of Jurists in 1920. It makes impossible the interpretation of Art. 38(1)(c) according to which 'general principles of law' are simply principles 'common to all civilised nations'. It clearly defines that 'general principles of law' are principles of international law. (Tunkin 525) International Commission of Jurists [ICJ]; Interpretation in International Law).

However, even the drafters of the original text had not stated that the reference to general principles of law would entitle the ICJ to decide on a basis other than international law. They had rather viewed general principles of law as part of international law.

C. The Application by the International Court of Justice of Principles of International Law that Find a Parallel in Municipal Laws

7 General principles that exist in municipal systems of law do not necessarily form part of international law (see also International Law and Domestic [Municipal] Law). The main reason lies in the difference in structure between international society and municipal societies. This difference may make it inappropriate to transpose to international relations a principle that is part of municipal law.

8 When a principle exists both in municipal laws and in international law, the origin of the principle is likely to be in municipal systems, given the greater development and wider practice relating to those systems. However, the application of the principle in international law does not necessarily depend on the fact that the principle is common to a number of municipal systems.

9 The case law of both the PCIJ and the ICJ provides some examples of decisions in which a principle of international law was regarded as having a parallel in municipal laws. For instance, in the *Case concerning the Factory at Chorzów (Germany v Poland)*, the PCIJ found that

It is ... a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him. (*Case concerning the Factory at Chorzów [Germany v Poland] [Claim for Indemnity] [Jurisdiction]* 31; see also *German Interests in Polish Upper Silesia, Cases concerning the*)

This passage was approvingly quoted by the ICJ in the *Gabčíkovo-Nagymaros Case* (Hungary/Slovakia) (para. 110).

10 In the *Corfu Channel Case* the ICJ noted that

By reason of the exclusive territorial control of a State within its frontiers the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law and its use is recognized by international decisions. (*The Corfu Channel Case [United Kingdom of Great Britain and Northern Ireland v Albania] [Merits] ['Corfu Channel Case']* 18)

The reference to 'all systems of law' has apparently the purpose of confirming what is already established under international law.

11 A greater readiness to accept the view that a general principle of law applied in municipal systems is relevant as such for an international court or tribunal appears in a passage of the ICJ's advisory opinion on *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*. (see also *Administrative Boards, Commissions and Tribunals in International Organizations; Advisory Opinions*). The ICJ noted that the United Nations Administrative Tribunal was 'an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions' and said: 'According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res iudicata* and has binding force between the parties to the dispute' (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal [Advisory Opinion]* 53). The ICJ hinted again at the existence of 'general principles of procedural law' in the *Case concerning the Land, Island and Maritime Frontier Dispute ([El Salvador/Honduras] Application of Nicaragua for Permission to Intervene [Judgment])* para. 102; *Land, Island and Maritime Frontier Dispute Case [El Salvador/Honduras: Nicaragua Intervening]*).

12 The ICJ may have referred to a general principle of law existing in municipal systems also in the *Temple of Preah Vihear Case* when it found that

It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error. (*Case concerning the Temple of Preah Vihear [Cambodia v Thailand] [Merits]* 26)

13 The great variety of approaches that are taken on specific legal issues by municipal laws—even when they may lead to the same practical result—often makes it difficult to ascertain whether a general principle exists. The doubt was even expressed by H Kelsen 'whether such principles common to the legal order of the civilized nations exist at all' (Kelsen 539).

14 In several decisions the ICJ concluded that there was no general principle of law that could be applied to the questions raised. Thus, for instance, in the *South West Africa Cases* the ICJ noted

that an argument raised by the claimant State amounted 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 Art. 38, paragraph 1 (c), of its Statute. (*South West Africa Cases [Ethiopia v South Africa; Liberia v South Africa] [Second Phase]* para. 88; *South West Africa/Namibia [Advisory Opinions and Judgments]*)

15 Similarly, in the advisory opinion on *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal*, the ICJ held that there was no

general principle of law which requires that in review proceedings the interested parties should necessarily have an opportunity to submit oral statements of their case to the review tribunal. General principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal. (*Application for Review of Judgment No 158 of the United Nations Administrative Tribunal [Advisory Opinion]* para. 36; *United Nations Administrative Tribunal, Applications for Review [Advisory Opinions]*)

16 Often general principles are only vague and are of little use should one intend to apply what is common to a large number of legal systems. Unlike certain arbitration tribunals, the ICJ has been understandably reluctant to apply general principles in a way that would imply a selection among municipal rules and thus the use of a large amount of discretion in finding the more appropriate rule. The ICJ would not only run into the difficulty of engaging itself in a comparative analysis. It would also have to face the risk of transgressing into the application of equity (Equity in International Law), which according to Art. 38 (2) ICJ Statute would require the specific consent of the parties to the dispute. As was observed by G Fitzmaurice,

the concept of the general principles is so fluid that a quasi-legislative element would often be introduced into the Court's decisions by any 'bold' application of them, and ... considerable harm might be done to the desideratum of increased resort to the Court unless a reasonable predictability as the basis of its decisions can be maintained. (Fitzmaurice 325)

D. References by the International Court of Justice to Principles that are Relevant only under International Law

17 When the ICJ referred to principles of international law or to general principles it often considered principles that do not find a parallel in municipal laws. Thus, for example, in the *Corfu Channel Case* the ICJ found that the Albanian authorities were under the obligation to notify the existence of a minefield in their territorial waters (Territorial Sea) and to warn the approaching ships of the imminent danger. The ICJ said

Such obligations are based ... on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. (*Corfu Channel Case* 22)

In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention, Reservations [Advisory Opinion] ; see also *Genocide*), the ICJ noted that 'the principles underlying the Convention are principles which are

recognized by civilized nations as binding on States, even without any conventional obligation' (ibid 23). Again, in its advisory opinion on Western Sahara the ICJ stated 'the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples' (*Western Sahara [Advisory Opinion]* para. 59). ; *Western Sahara [Advisory Opinion]*; see also *Self-Determination*). As a further example, the Chamber judgment in the *Frontier Dispute Case (Burkina Faso/Republic of Mali)* considered 'the principle of *uti possidetis juris*' as 'a fairly established principle of international law where decolonization is concerned' and as 'a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs' para. 20; *Uti possidetis Doctrine*).

18 The relatively frequent reference by the ICJ to principles that are not part of municipal laws is explained, at least in part, by the narrow definition of customary international law that is provided in Art. 38 (1) (b) ICJ Statute. Should custom be regarded, as stated in that provision, as 'evidence of a general practice accepted as law', given the insufficiency of practice, several rules of international law which are not based on treaties would not fit in the definition of custom. Hence the reference to principles or general principles. Only in certain cases could these principles appear as an abstraction from specific norms of customary international law. This would be, for example, the case of the principle of the freedom of maritime communication, which is referred to in the passage from the *Corfu Channel Case* (see para. 17 above).

19 Art. 38 (1) (c) ICJ Statute requires a general principle of law to be 'recognized by civilized nations'. When a given principle is only part of international law, recognition of that principle would reflect the attitude that is taken in its regard by the international community, and thus essentially by States. In other words, for a principle to exist it would be necessary that States acknowledge, albeit implicitly, that this principle applies to their international relations. Thus, for instance, in the *Frontier Dispute Case*, when assessing whether the principle of *uti possidetis* applies in international law, the Chamber noted that

the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself, are evidently declaratory rather than constitutive: they recognize and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent. (*Frontier Dispute Case* para. 24) ; see also African Union [AU]).

20 The assertion by the ICJ of a general principle of law, whether or not it finds a parallel in municipal systems, is only rarely accompanied by an adequate demonstration of its existence in international law. A similar remark could be made with regard to the ascertainment by the ICJ of international customary rules.

E. The Relations between General Principles and Customary or Treaty Rules

21 Even if general principles of law are often vague, they may complement to a certain extent other rules of international law and thus contribute to filling in gaps (General International Law [Principles, Rules and Standards]). Principles do not necessarily have a subsidiary character. Some of the principles referred to in the preceding paragraphs clearly do not have that character. In any event, their character would not depend on whether or not they find a parallel in municipal systems.

22 One cannot assume that treaty rules always prevail over general principles of law. This would normally be the case when the treaty and the general principle cover the same ground. However, a general principle could also affect the way in which a certain treaty rule is to be applied. It could impinge on the application of the treaty rule in limited circumstances. In that case it would be more

appropriate to say that the principle prevails.

23 The position of general principles of law in the list of sources of international law contained in Art. 38 (1) ICJ Statute is not indicative. As Lord Phillimore pointed out during the preparatory work of the PCIJ Statute, 'the order mentioned simply represented the logical order in which these sources would occur to the mind of the judge' (Permanent Court of International Justice: Advisory Committee of Jurists *Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, with Annexes 333*).

24 A general principle of law may be embodied in a treaty provision or become part of international customary law. The origin of a treaty or customary rule in a general principle of law would not be material. The ICJ gave an example of such an embodiment in the *Case of the Monetary Gold removed from Rome in 1943* when it stated that 'to adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent' (*Case of the Monetary Gold removed from Rome in 1943 [Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America] [Preliminary Questions]* 32; *Monetary Gold Arbitration and Case* ; see also *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*).

F. The Application of General Principles of Law by International Tribunals

25 General principles are often applied by international tribunals irrespective of whether there is a specific reference in their constituent instrument. Certain decisions refer, like the ICJ, to principles that find a parallel in municipal systems.

26 Thus, the arbitration award in the *Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy* stated that

A decision with the force of *res judicata* is legally binding on the parties to the dispute. This is a fundamental principle of the law of nations repeatedly invoked in the legal precedents, with regard [to] the authority of *res judicata* as a universal and absolute principle of international law. (at para. 68)

Similarly, the arbitration award in the *Case concerning the Loan Agreement between Italy and Costa Rica* referred to the fundamental character of the principle of good faith in international law and included it among the general principles of law recognized by civilized nations (at para. 14).

27 When there are differences in the way in which municipal systems address an issue, the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted in the *Tadić* Case that

national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognized by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion ... More specifically, it would be necessary to show that, in that case, the major legal systems of the world take the same approach to this notion. (*Prosecutor v Tadić [Opinion and Judgment]* para. 225)

This cautious attitude corresponds to that of the ICJ, but is more explicitly defined.

28 Other international tribunals have had less hesitation in applying general principles of law even in the presence of discrepancies among municipal systems. For instance, in *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, the arbitrator was required

to interpret the relevant contract

in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals. (at 303)

The arbitrator found that the corporation was entitled to compensation but not to restitution, which would have been required under certain municipal systems, because '[a] rule of reason ... dictates a result which conforms both to international law, as evidenced by State practice and the law of treaties, and to the governing principle of English and American contract law' (ibid 354). see also Corporations in International Law).

29 In the first International Centre for Settlement of Investment Disputes (ICSID) arbitration award in *Amco Asia Co v Republic of Indonesia* (Amco v Indonesia Case), the panel found that 'the full compensation of prejudice, by awarding to the injured party the *damnum emergens* and the *lucrum cessans* is a principle common to the main systems of municipal law, and therefore, a general principle of law which may be considered as a source of international law' (*Amco Asia Co v Republic of Indonesia* [Award of 20 November 1984] para. 267).

30 The choice of what is considered the better law under the guise of the application of principles of law is frequent in commercial arbitration, where the reference to general principles provides an apparently objective criterion (see also Commercial Arbitration, International). A similar approach is taken by the European Court of Justice, which only rarely refers to the pertinent rules of municipal laws and attempts to find a genuinely common denominator.

G. Assessment

31 When determining the applicable law, references to general principles of law undoubtedly provide international courts and tribunals with discretion. Only rarely could one say that a certain principle may be inferred from more specific rules of international law. While the distinction between principles and rules has not been elaborated in judicial or arbitral decisions, the use of the term principles denotes the general nature of the norm in question.

32 The ICJ generally asserted the existence of principles in international law irrespective of their correspondence to principles pertaining to municipal laws. The ICJ thus included in general international law norms that could not be defined as part of customary law. Principles drawn from municipal laws were applied only with caution by the ICJ. On the contrary, arbitration tribunals have shown little hesitation in referring to municipal systems even when they arguably offer a variety of solutions and the adoption of one or the other solution necessarily implies a considerable discretion.

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A. Introduction

1. Notion

1 The term 'source of law' may mean different things. It may refer to either historical, ethical, social, or other bases for a legal rule, or it may refer to legal rules as such (Abi Saab 31). The notion will be used here in the latter sense.

2 Speaking of 'sources of international law' presupposes that there exist legal, ie binding, rules in international law. This view is not uncontested and, apart from that, those who take that view advance different reasons why international law consists of binding rules.

2. Binding Nature of International Law

3 Generally speaking, those who argue that international law is binding rest their claim on one of two arguments: they either refer to the consent expressed by those subjects of international law being bound (Oppenheim 332), or they ascertain that the norm in question reflects accepted meta-legal principles such as justice, equity, and fairness (Equity in International Law).

4 This contribution takes the position that, ultimately, no individual source of international law (treaty law, customary international law, general principles, etc) is founded on one of these two justifications alone. Neither can, for example, international treaties provide for a long-term sustainable order among States, notwithstanding the consent of the States involved, if they do not also mirror the principles of justice, equity, and fairness. Nor is it possible to establish an international order on justice, equity, and fairness alone, however defined, if the subjects of international law do not consent thereto. The delicate balance between these two foundations of international law has to be achieved for each source of international law at the moment of its establishment and it has to be upheld over time. A variety of mechanisms are available in international law to gain consent, uphold consent, or to ensure that a norm under consideration meets the principles of fairness, equity, and justice. Reservations to international treaties; objections to the establishment of a rule of customary international law; the review of existing international treaties; the drafting of subsequent ones; the modification of treaty as well as customary law through subsequent practice; the establishment of peremptory norms of international law (*ius cogens*); and the development of non-binding rules such as resolutions and declarations of international organizations and international conferences having an impact on the progressive development of international law should be seen from this point of view. It is decisive to take into account that the sources of international law constitute a unity, and together form the corpus of international law. Whereas some sources may predominantly be based upon consent (eg international treaties), others may be more open to meta-legal and general considerations derived from ethics, reasonableness, and logic (principles of international law) (see also Ethos, Ethics and Morality in International Relations; Reasonableness in International Law). Therefore, the corpus of international law comprising all sources is based upon consent as well as meta-legal rules and general considerations. In that respect, the individual sources of international law complement each other as far as their substance but also, and more prominently, as far as their foundation is concerned.

5 Those who deny the binding nature of international law (amongst others Posner and Goldsmith; Bolton) argue that international law serves more as a set of guidelines than legal rules. They advance several reasons, from the lack of a central law-making power and the lack of efficient enforcement mechanisms, to the assumption that States act—and should act—only in the furtherance of self-interest, thus denying the existence of community interest[s]. This approach is neither new nor innovative. It can be traced back to Hans Morgenthau and Carl Schmitt. Although some of their criticism of international law is well-founded, they fail to explain why subjects of international law conclude international treaties and why they try to justify any alleged deviation

from a commitment entered into. They also fail to appreciate that the States—even the most powerful ones—are in favour of establishing a world order which has a stabilizing effect on world affairs. And finally, they cannot rebut the argument of Louis Henkin that ‘almost all nations observe all principles of international law and almost all of their obligations almost all of the times’ (at 47).

6 This contribution is based on the premise that international law is constituted by legally binding norms, stemming from different sources. The term ‘sources’ refers to two different, albeit interrelated, issues, namely, the process and procedure through which binding rules of international law and the rules of international law as such are generated. The process character of international law is being emphasized not with the aim to question the legally binding nature of international law but to indicate that international law is in permanent flux, even though it is meant to have and does have a stabilizing effect on international relations.

B. Identification of Sources of International Law

7 Unlike national laws where the sources of law are usually specified in a norm superior to laws and regulations, usually a constitution, no such norm exists in international law (Shaw 66). Some consider this a deficiency of international law (Posner and Goldsmith). This criticism has its foundation in an emphasis of national law as the only model for a legal order; a view that disregards the fact that the legal rules governing the relationship between subjects of international law may have to follow different principles.

8 However, statutes of international courts and tribunals specify the sources of international law they may use. Notably, an international court or tribunal may not have the competence to invoke international law *in toto* but rather a part thereof. For example, according to Art. 293 UN Convention on the Law of the Sea, international courts and tribunals having jurisdiction under Part XV Section 2 of the Convention shall apply the Convention and other rules of international law not incompatible with the Convention. In other words, the international courts and tribunals concerned are not free to apply international law in its totality, at least theoretically.

9 According to Art. 38 (1) ICJ Statute, the sources to be applied by the International Court of Justice (ICJ), whose function it is to decide in accordance with international law such legal disputes as are submitted to it, are:

- a) international treaties, whether general or particular, establishing rules recognized by the contesting States Parties to a dispute before the ICJ;
- b) customary international law as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations; and
- d) subject to the provisions of Art. 59 ICJ Statute, judicial decisions and teachings of the most highly qualified publicists (Art. 38 (1) ICJ Statute). It is evident from the wording of Art. 38 (1) (d) ICJ Statute that the latter are of a subsidiary nature only. They do not actually qualify as sources of law but rather as means to establish the existence of sources of law.

10 This provision identifies the sources which the ICJ is meant to apply in deciding a dispute submitted to it; it is also referred to as establishing the authentic list of the sources of international law (Thirlway). Although this view may find some justification in the Chapeau to Art. 38 ICJ Statute, it disregards the objective of this provision. It is the States concerned that eventually decide what constitutes international law (Higgins 18). If this approach is being followed, Art. 38 ICJ Statute states in a merely declaratory manner which sources of international law existed when this provision was drafted (Abi Saab). In addition to the sources listed, other sources exist, such as binding decisions of international organizations and unilateral acts. Therefore, Art. 38 (1) ICJ Statute does not provide for a complete list of sources of international law the ICJ may use, and in effect

has used, in its jurisprudence.

11 Art. 38 (1) (a)–(c) ICJ Statute do not establish a hierarchy of the sources, although international courts and tribunals will, as a matter of convenience, invoke international treaties first. Apart from those provisions which are considered *ius cogens*, no such hierarchy exists. It is easily conceivable that the same matter is governed by treaty as well as customary international law and that these rules coexist or that customary international law is supplementing treaty law. The relationship between the sources is to be established on a case-by-case basis by having recourse to the established international law principles of interpretation, such as the *lex specialis derogat legi generali* rule or the *lex posterior derogat legi priori* rule (ILC).

C. Law-Making Process in International Law

1. Introduction

12 In general, international law lacks a central law-making power equivalent to the one in national legal systems. The characteristic feature of international law is that its main addressees are also the ones who create international law. Therefore, international law has elements of self-commitment as well as contractual elements, although it would be a simplification to qualify international law only or even predominantly from these two points of view. As already indicated, international law is not only based upon the consent of the States concerned but reflects and has to reflect principles such as justice, equity, and fairness. Such principles are—as can be taken from the evolution of the international community since the end of World War II—not static but develop progressively as required. Whereas traditionally, international law was considered as a legal system co-ordinating activities of States, it has developed under the aegis of the United Nations into a legal regime which is increasingly dominated by the principle of co-operation (Co-operation, International Law of). Some areas of international law, in particular the ones on economic relations or on the protection of the environment, are governed by the principle of solidarity (Solidarity, Principle of). The latter goes beyond the principle of co-operation in that it requires the subjects of international law not only to co-operate amongst each other but also to take into consideration the interest of others and to be guided by the interests of the international community as such. This, as well as the international human rights regime which influences other areas of international law, has an impact on the interpretation of international treaties and on the development of the sources of international law in general.

13 It has already been stated that international law is not static but should also be considered as a process, which means it is in a process of establishment, modification, or conformation. This process should be seen as a unity; all modifications of one of the sources of international law should be understood and assessed from its impact upon international law as such (Besson 170).

2. The Making of Treaties

14 The drafting and adoption of international treaties is tailored to the objective of achieving consent amongst the parties concerned. International treaties are developed in a contractual and thus consensual manner, although it would be misleading to consider international treaties from the point of view of contracts only. In particular, multilateral treaties designed to accommodate community interests are meant to establish an international legal order. The international law on treaties is further guided by the aim to preserve the stability of international treaties once accepted and, as far as multilateral treaties of a general nature are concerned, to achieve the maximum participation of parties in the legal regimes established by each of them.

15 In international law treaties fulfil the function laws have under national law, as they set, besides other sources, law. It has been suggested that international treaties are not a source of law but

only a source of legal obligations amongst the parties (Fitzmaurice; see also Abi Saab). This view, however, focuses on bilateral treaties and, even as far as those are concerned, fails to acknowledge their contribution to the corpus of international law at large. In law-making treaties, the contribution to the corpus of international law outweighs the obligation owed to other parties. In fact, the rights of other parties in such treaties, for example, human rights treaties, are mechanisms of enforcement rather than substantial rights. Their emphasis is on giving the parties to such treaty regimes standing within the implementation and enforcement schemes provided by such treaties.

16 The generation of international law is often referred to as law-making process (Besson 164). However, it has to be borne in mind that a law-making process which is equivalent to such a process under national law does not exist in international law, except in a few instances (denied by Posner 28). Only rarely do international organizations exercise law-making power (for details see Alvarez [2005]). International treaties are drafted by their potential addressees and the potential addressees have to express their consent to be bound, for example, by ratification, accession, or in other forms envisaged in Arts 11 et seq Vienna Convention on the Law of Treaties (1969). Their basis of legitimacy and the basis for them being binding is, accordingly, firstly the consent of the States concerned. In contrast thereto, in the municipal system, laws are enacted by the competent institutions in a settled law-making procedure and they are also binding on subjects who have not participated in their creation, since the acting institutions are empowered to enact binding rules. Hence, the procedure for drafting international treaties and national laws bears no similarities. Nevertheless, one can hardly deny that international treaties have equivalent functions in international relations to laws in a municipal legal system.

17 The procedure of drafting international treaties is designed so as to generate consent among the participating States or other subjects of international law. Generally speaking, the whole process may be divided into four stages: first, the process of negotiating an international treaty and reaching a preliminary consent among the representatives of the States involved on the text (adoption of the treaty); second, the process during which the consent reached on the international plane is confirmed on the national level; and third, the expression of consent internationally. The fourth stage is the implementation of the international treaty, its interpretation, and its modification through revision, amendments, protocols, or other instruments and through subsequent practice.

18 As far as the first stage is concerned, the drafting of bilateral agreements and of multilateral agreements differs. With respect to bilateral treaties, both sides will normally come with their drafts or positions prepared and try to find a compromise in the bilateral meeting or meetings. The situation is much more complex at multilateral conferences, in particular at conferences in which virtually all States participate. Here, the potential solutions are too numerous for the participants to foresee all of them. Historically, multilateral treaties were adopted by unanimity. According to Art. 9 Vienna Convention on the Law of Treaties—a default rule—a draft may be adopted by a two-thirds majority. On the one hand, this provides for some flexibility, especially since it precludes that one State can impede the acceptance of a draft. On the other hand, the two-thirds majority rule may lead to the adoption of a treaty against a minority, perhaps just that group of States whose interests are particularly affected. The alternative has become, at many international conferences, in particular the ones undertaken under the auspices of the UN, to apply the consensus rule. This means an agreement is adopted if no participant challenges the consensus reached by insisting on a formal vote. In fact, this does not mean that every participant fully agrees with the result achieved but that it considers its objections not to be serious enough to challenge the result as such. Very often this procedure is combined with a majority vote system. If a participant objects, the text will be accepted by the required majority. The consensus principle has significantly changed the negotiation techniques. It has strengthened the position of the chairpersons in charge. The consensus principle further encourages States to form interest groups. This means, in effect, that at multilateral conferences the integration of the individual objectives or claims of States into one, namely the draft treaty, takes place on several subsequent levels—interest groups, regional

groups, subject-oriented committees—until the final decision is reached. Finally, the consensus principle leads to ‘package deals’, which means trade-offs. Therefore, multilateral treaties are not as firmly based upon consent as bilateral treaties. The States participating therein are guided by other considerations besides their individual interests. Regional allegiances or overarching interest group policies may have an impact upon the decision of a State to accept the result achieved.

19 After the conclusion of the negotiating process on the international level, the draft is submitted to the municipal acceptance procedure. The national procedures vary widely, in particular to the extent the parliamentary bodies are involved. As a matter of principle, States are free as to how to organize the national procedure of approval, in particular to the extent that the national parliament is to be involved. Only rarely does an international treaty require a particular action to be taken on the national level, although it is in the interest of international law to strengthen the basis of the national legitimacy of the commitments entered into by the States. Equally, international law does not regulate how States Parties to a treaty ensure that the commitments are implemented on the national level if such implementation is required. These are two lacunae which may result in weakening the legitimacy of international treaty law and render its implementation less effective.

20 Once the national procedure of accepting an international treaty is complete, the consent to be bound is expressed; in the case of a bilateral treaty to the other party and in the case of a multilateral treaty to the community of States Parties of this particular treaty represented by a depositary.

21 International treaties, once adopted, are not static; they are living instruments which develop through interpretation, and they may be amended, revised, or supplemented by subsequent instruments. They may also be changed through subsequent practice in accordance with Art. 31 (3) (b) Vienna Convention on the Law of Treaties. In particular, the latter mechanism constitutes a flexible mode to adjust international treaties to new facts or considerations.

3. The Development of Customary International Law

22 At the outset, international law was mainly constituted by customary international law. Under the aegis of the UN, a multitude of international treaties have been concluded, prompting some authors to express doubts concerning the remaining relevance of customary international law (Friedman 121–3). Others, however, emphasize that customary international law remains of high significance. They argue that, first, the development and adjustment of customary international law is more flexible than the development of treaty law; and second, customary international law is, by its very nature, universal, whereas treaty law binds the parties to these treaties only (D’Amato 12). This does not exclude the possibility of regional or even bilateral customary law. The development of customary international law reflects the characteristics of the international community understood as a legal community. It has the advantage that all States may share in the formulation of new rules and that customary international law can be modified, changed, or amended through this international community more easily than is possible for treaty law (Shaw 70). Certainly, customary international law is less precise than most treaty law but such a lack of precision also constitutes an amount of flexibility. In particular, it may be more easily and more quickly responsive to new factual developments.

23 The term ‘customary international law’ may refer to both the generation of law and the result of that process. While there is agreement concerning the process nature of customary international law, its foundation and binding nature have been the subject of a long-standing controversy. One theory, that was particularly endorsed by Soviet writers, is that customary law is based upon a tacit agreement (Tunkin). This implies that customary international law depends on the will of States, as does treaty law. This, however, is a fiction which is rather difficult to sustain. According to a different approach, the binding nature of customary international law has its basis in the longstanding practice of States, allowing one to expect that this practice will continue (Kelsen). A

third group argues that customary international law develops spontaneously from within the international community and derives its legitimacy from the fact that such rules are needed for the well-being of the international community (Ago). This is reminiscent of natural law approaches.

24 Apart from this controversy, it is accepted that customary international law consists of two elements: State practice and *opinio iuris*. Art. 38 ICJ Statute refers to 'international uniform custom, as evidence of a general practice accepted as law'. This formulation, however, is unsatisfactory (Van Hoof 87). It is generally accepted that custom is applied, and it is practice which serves as evidence for custom (Higgins 18). Still, it remains controversial whether the emphasis lies on State practice or on *opinio iuris*, what constitutes State practice, and how the *opinio iuris* is to be expressed.

25 It is well established that both practice and *opinio iuris* are necessary to establish customary international law. This, however, does not imply that customary international law has a voluntative basis similar to international treaties. *Opinio iuris*, the belief that a certain conduct is required or permitted under international law, is in fact a conviction that such conduct is just, fair, or reasonable and for that reason is required under law. Such meta-legal or general legal considerations differ from the consent expressed in respect of treaty-based commitments. *Opinio iuris* develops in response to an assessment of foreign or own conduct. Only if this assessment leads to a positive result, namely that such conduct is to be considered as legally required, the necessary *opinio iuris* will form. If the assessment leads to a negative result it will not materialize; rather, the practice will be countered on legal grounds or at least will not be accepted. Therefore, every *opinio iuris* is the result of a value judgment, an element which is not inherent in (or at least not prominent in) expressing consent to an international treaty.

26 Practice usually manifests itself in activities or omissions attributable to particular subjects of international law, mostly of States. These activities may have an internal character or may be exercised on the international level (Degan 149). International treaties can reflect a State practice relevant for the formulation of customary international law. The conclusion, for example, of numerous investment treaties may be seen to establish customary international law. However, one may also argue that if States feel the necessity to conclude such international agreements, they do not believe that the practice so far existing is a reflection of an obligation to that extent. Still, the practice of States is nowhere better reflected than in treaties. Also, judgments of international courts or tribunals are considered as being of relevance for the development of customary international law. This is so for two reasons. First, judgments of international courts or tribunals may refer to certain norms as being customary international law. As such, they do not create customary international law but they identify and formulate it, and to that extent they are a source of reference. Apart from that, judgments of international courts or tribunals may also contribute to customary international law. Custom may develop amongst States, but equally in international organizations. This does not mean to say that a custom develops directly from, for example, resolutions of the UN General Assembly; but it cannot be denied that a frequent repetition of certain principles by UN organs, in particular the General Assembly, may, over time, amount to custom.

27 One of the elements which is considered to be of particular relevance for a practice is that such practice was carried on for a certain period of time (density and uniformity of the practice; Degan 150 et seq). It has been argued that custom may come about rather quickly or even instantly (Cheng). The law of outer space has been named as an example. The same may happen in response to widespread moral outrage regarding crimes committed in conflicts, such as those in Rwanda and Yugoslavia, that brought about the rapid formation of a set of customary international law rules concerning crimes committed in internal conflicts.

28 Non-governmental organizations have no impact on the formulation of customary international law as long as their actions are not directly attributable to States. However, to the extent that such actors are engaged in the work of international organizations, they can at least indirectly influence

the formulation of customary international law. The International Committee of the Red Cross (ICRC) is an exception, though; it has contributed significantly to the development of customary international law.

29 Not every usage transforms into customary international law, but only that which is carried by an *opinio iuris*. This has been emphasized by the jurisprudence of the ICJ (see for example in the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* paras 66 et seq; Nuclear Weapons Advisory Opinions). As indicated above, *opinio iuris* constitutes a value-based assessment of a certain practice which leads to the conclusion that this practice is required by law.

30 It is subject to much debate how customary international law can be changed or modified. Does the breach of a customary international law rule lead to the abolition of the rule, or even to the creation of a new one? This has been argued (Higgins 19) on the grounds that customary international law is a process. But it is more than simply a process—customary international law also has a stabilizing effect through which it contributes to the establishment of an international legal order. This stabilizing function derives from established practice and the accompanying belief that the practice is accepted as law—*opinio iuris*. In the situation of a breach, an established practice is lacking, as is the belief that such practice is required by law. The breach of an established norm may trigger the development of new customary international law only if other States follow such an example and a corresponding *opinio iuris* develops. Until such development comes to a conclusion, the deviation from a norm of customary international law remains a breach. It is relevant to note at this point that the breach of a norm of international law may actually be the first step of reconciling law with reality. What is essential, though, is that this development cannot be achieved by one State alone but only if other States join in (or do not object to) this practice and develop a corresponding *opinio iuris*. This is what constitutes the responsiveness of customary international law towards new developments, may they be factual or changes of attitudes.

31 Customary international law is frequently codified in treaties; customary law and treaty law then continue to exist side-by-side. This has the advantage that identical or at least similar rules are applied to States Parties and non-States Parties. However, it may happen that the customary international law rules change over time, whereas the treaty rules remain unchanged. In the past, this has caused some debate regarding the interpretation of the right to self-defence. Some argue that due to the increase of potential actors in armed conflicts, the scope of the right of self-defence under customary international law has changed.

32 To conclude, it may be reiterated that customary international law is more than just a process since it has a stabilizing effect on international relations. It does not depend upon the will of States or other subjects of international law but upon their value-based assessment that such practice is required by law. The practice of one may be followed by others and a corresponding *opinio iuris* may form, developing such practice into customary international law. The situation may also be reversed; a political opinion may have formed, for example, in a resolution of the UN General Assembly or at a Summit, followed by corresponding practice while the political opinion mutates into an *opinio iuris*. What is essential is that all States may and do contribute to the development and shaping of customary international law, including those who express reservations. Although this participation is governed by the principle of equality of States, it is nevertheless evident that, as the ICJ expressed in the judgment on the North Sea Continental Shelf Cases (at paras 73–4), those States particularly affected by potential new rules of customary international law have a particular impact on the development or the non-development of a particular rule of customary international law (Virally). As such, customary international law is particularly suited to constitute a counterweight against and supplement to consent-based international treaties.

4. The Development of General Principles

33 The term ‘principle’, generally speaking, may signify one of two things. It may either refer to

meta-legal principles—ie principles generated within a philosophical or ethical discourse and then introduced into a normative system (Accioly 33 et seq)—or it may refer to principles inherent in or developed from a particular body of law or law in general. In the following, only the latter will be dealt with.

34 International and regional courts and tribunals make use of principles as an interpretative tool or as a source of concrete obligations. These two functions cannot be separated clearly.

35 Principles may be derived from municipal law, from general considerations, or, by generalizing, from a particular treaty regime. The development and recognition of such principles does not depend on the will of States and all States equally contributing to their development. These principles may, in particular, introduce overarching considerations into international law and, as such, may supplement international treaty law, in particular by influencing the interpretation of the latter.

36 Art. 38 (1) (c) ICJ Statute establishes that general principles derived from municipal law are sources of international law. The ICJ only sporadically referred to general principles in its judgments or advisory opinions. In none of these did the general principles referred to by the parties become a basis for the reasoning of the Court.

37 On the other hand, the ICJ frequently made use of principles derived from general considerations as well as principles derived from a particular treaty regime. As to the former, reference may be made to its judgment in the Corfu Channel Case. Here the ICJ found that the Albanian authorities were under the obligation to make known the existence of a minefield in their territorial waters and to warn the approaching ships of the imminent danger. The ICJ said: 'Such obligations are based...on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel Case [Judgment] [Merits]* 22). One of the prime examples for a principle derived from legal relations in general is the principle of good faith (*bona fide*) which, in the view of the ICJ, governs the creation and performance of legal obligations (*Nuclear Tests [Australia v France] [Judgment]* 268 and *Nuclear Tests [New Zealand v France] [Judgment]* 473; *Nuclear Tests Cases*).

38 On numerous occasions, the ICJ has had recourse to principles derived from particular treaty regimes. An early example is the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* where the ICJ noted that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation' (at 23; *Genocide Convention, Reservations [Advisory Opinion]*). In the jurisprudence of the Court, frequent references have been made to the principles enshrined in Art. 2 United Nations Charter. In the Case concerning Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v France*), particular use was made of a treaty-based principle. The Court considered whether principles set out in the Treaty of Friendship and Co-operation between Djibouti and France of 1977 would inform the way in which the obligations under the Convention on Mutual Assistance in Criminal Matters of 1986 were to be interpreted (*[Judgment]* paras 104–114). Here, principles were used to bridge the gap between two separate treaties concluded between the same parties.

39 Principles of law complement other sources of international law in various ways; they guide the interpretation of international treaties and, due to their abstract formulation, are the gateway for progressive interpretation. As the jurisprudence of the ICJ demonstrates, principles of international law may connect treaty regimes. They may be the starting point for the evolution of a new rule of customary international law and they have frequently had an influence on the interpretation of the latter. Principles of law have even been used as a basis for the development of new rights and obligations. In general, they may, and indeed have, become the motor of a progressive

development of international law.

5. The Contribution of International Organizations

40 International organizations are playing an increasing role in the establishment of an international normative order (Alvarez [2002] 218 et seq). Their functions vary considerably. While they may only have the role of an initiator and a facilitator of treaty-making conferences, sometimes they exercise truly legislative tasks.

41 Even in those cases where international organizations only initiate legislative processes, which are then taken over by the participating States, their influence is not to be underestimated. Their technical expertise may give them—notably the respective secretariats—a significant influence concerning the issues and the outcome of the norm-creating process. So far, very few international organizations have prescriptive functions such as the International Civil Aviation Organization (ICAO), concerning the regulation of flights over the high seas, or the International Seabed Authority (ISA), which promulgates regulations on deep seabed mining. It has been suggested, in particular in respect of the protection of the international environment, to establish authoritative institutions exercising quasi-governmental functions concerning global problems.

42 One may also speak of a 'norm-creating function' of the UN Security Council. Some decisions of the Security Council taken under Chapter VII of the UN Charter are of a normative nature since they regulate the relations amongst their addressees; provide for the establishment of institutions, such as international criminal courts, including the legal framework in which they function; and even create a regulatory order. The latter is true, for example, for Security Council Resolution S/687 (1991) of 3 April 1991, setting out the conditions for a ceasefire in the war against Iraq (see also UNSC Res 1373 [2001] 'Threats to International Peace and Security Caused by Terrorist Acts' [28 September 2001] SCOR [1 January 2001–31 July 2002] 291; UNSC Res 1540 [2004] 'Non-Proliferation of Weapons of Mass Destruction' [28 April 2004] SCOR [1 August 2003–31 July 2004] 214). Although Security Council decisions have a consensual origin, namely the acceptance of the UN Charter, the legitimacy of such decisions has been put into question (Weston). It is a salient question of whether the existing foundations of international law allow for the establishment of international organizations which have norm-creating functions not based upon consent of the addressees of the norms they prescribe.

43 Resolutions of the UN General Assembly call for a differentiated view. They may play a significant role in law-making even though they are non-binding, notwithstanding the fact that their recommendatory character is based upon State consent. General Assembly resolutions may be declaratory of existing customary law. As such they are not law-making in the true sense of the word but only a means of reference. There have been instances of General Assembly resolutions starting a process which eventually led to the adoption of an international treaty. Finally, repeated General Assembly resolutions adopted by consensus or unanimously may be considered State practice, thus establishing new customary international law.

44 So far, only the external effects of General Assembly resolutions and decisions have been addressed. It is well established that internally, certain decisions of the General Assembly have normative functions.

45 Regional organizations and arrangements offer, due to the homogeneity of their membership, increased possibilities for the development of a regional normative order. It is worth considering whether one should acknowledge that the international community is formed of regions and consequently put more emphasis on regional integration; there are tendencies pointing in that direction.

6. The Contribution of Courts and Tribunals

46 The contribution of international courts, tribunals, and dispute settlement mechanisms (for example the International Centre for Settlement of Investment Disputes [ICSID]) to the establishment of an international normative order also deserves attention. Considering judgments of international courts merely as an interpretation of a given international agreement does not do justice to their role. Any such interpretation contributes to the further development of the relevant agreement or of customary international law. For example, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Tadić* held that customary international law rules concerning methods and means of warfare applicable in international conflicts may also apply to non-international conflicts (*[Jurisdiction]* para. 137). This reasoning was not based on State practice; rather, the Appeals Chamber argued that the concerns of humanity were the same and could not depend upon the nature of the conflict. Nevertheless, international courts and tribunals as a rule are not considered to have norm-creating functions, although the line between interpretation and law-making is sometimes fluid. The first argument is a positivistic one. International courts and tribunals are called upon to settle disputes on the basis of international law. As a matter of logic, this means the law has to exist. Apart from that, judgments of international courts and tribunals bind only the parties to that dispute (Art. 59 ICJ Statute), although the interpretation of the relevant source may be influenced by that case. International courts or tribunals referring to previous judgments, in particular those of the ICJ, do not do so because they feel bound, but rather as a matter of convenience (Fitzmaurice 172; Jennings 73). Finally, those who equate the functions of international courts and tribunals with law-making, fail to acknowledge the relevance of the international law-making process.

7. Others

47 Non-State actors are playing an increasing role in the norm-creating process. Even though they do not participate on an equal footing in codification conferences, they may be involved in the pre-normative process which leads to the development of new international legal regimes. Examples are the impact of non-governmental organizations on the drafting of the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, and on the establishment of a mechanism for an individual complaint procedure under the 1979 Convention on the Elimination of All Forms of Discrimination against Women. Through this involvement, the views of representatives of the international society are introduced into the norm-creating process, eroding a monopoly of States. It has been argued that the proliferation and increasing influence of non-governmental organizations has strengthened the democratic element in international relations. Numerous international organizations have developed close links with non-governmental organizations engaging them in the norm-creating process they administer.

8. Ius Cogens

48 In national law there exists a complex hierarchy of legal sources: constitutions; acts of parliament; regulations; and administrative decisions.

49 In international law—at least in traditional international law—a comparable hierarchy was unknown. However, there was a shift in emphasis in the late 1960s. Within the UN General Assembly, the view evolved that some international norms should be accorded higher rank than others, in particular the right to self-determination. This had already been proposed in the 17th and 18th centuries by scholars such as Samuel Rachel, Christian Wolff, Georg Friedrich de Martens, and Emerich de Vattel. The 1969 Vienna Convention on the Law of Treaties adopted this approach and provided that a treaty will be void if at the time of its conclusion it conflicts with a peremptory norm of general international law (Art. 53). The same principle would apply to customary international law. This clearly establishes a hierarchy of sources. Such a rule must be accepted and recognized by the international community of States as a whole, which makes it evident that a peremptory

norm of international law rests on the consent or at least acquiescence of the world community. This consensual foundation deprives the *ius cogens* concept of the function to transport meta-legal or general considerations into international law, a function this concept had in the eyes of the proponents of natural law (see also Natural Law and Justice; Legal Positivism).

50 So far, no significant State practice has developed with respect to peremptory norms, in particular none which has qualified one concrete norm as being of peremptory nature (see also Art. 50 UN ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' [2001] GAOR 56th Session Supp 10, 43). No dispute has arisen amongst States in which a peremptory norm played a significant role. The notion is referred to mainly in academic writings and alluded to in advisory opinions of the ICJ (see *Legality of the Threat or Use of Nuclear Weapons* para. 79; Israeli Wall Advisory Opinion [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory] para. 157).

D. Assessment

1. Expanding Scope of International Law

51 The international normative order has significantly expanded over the last few years; international law now governs issues which would clearly have been considered domestic affairs up until the middle of the 20th century. But the international normative order has not only expanded as far as its scope is concerned. What is even more relevant is that it has a deeper and more direct impact on national law than ever before. New actors, besides States, have become involved in the shaping of the international normative order—international organizations; non-governmental organizations; and sometimes groups of individuals. Their influence cannot always be adequately described by reference to traditional mechanisms of international norm development. This has become a reality in spite of the warning not to blur the distinction between normative and non-normative rules and to differentiate between normative and pre-normative acts in the international norm-creating process (Weil 415).

52 The international normative order comprises the legal rules governing and guiding international relations. It prescribes what its subjects are obliged to do, must not do or may do, and which factual situation they have to establish (Dupuy 371). Thus far, the international normative order constitutes a stabilizing factor in international relations. This does not imply, however, that the international normative order has the sole function of restraining States in their international relations. On the contrary, international law is designed and also used to establish alternative forms of State conduct or, to rule out particular forms of conduct, to create new relations and new situations. Recent examples where pre-normative or normative acts have played a proactive role in international law-making are those where legal principles have been established serving as a foundation of new legal regimes. The common heritage of mankind principle in the context of the law of the sea and the principle of sustainable development in the context of the international protection of the environment are cases in point. However, the international normative order is not limited to regulatory functions. It also has an effect concerning the formation of the international community. This effect is sometimes referred to as the 'constitutionalization' of international governance (Frowein; Tomuschat). In this capacity, the corpus of international law is a precondition for the very existence and for the further development of the international community. It reflects the need and desire of its members for a common structure. It constitutes the framework in which its members may seek to accommodate their mutual interests and through which the interests of the international community as a whole can be formulated and achieved.

53 The rapid growth of international treaty law in recent times has occasionally resulted in changes in the texture of international treaties and in the way they have evolved. Currently, multilateral international treaties are developed step-by-step quite frequently. For example, the

1967 Outer Space Treaty (Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies) is based upon several resolutions of the UN General Assembly, while the 1969 Vienna Convention on the Law of Treaties was prepared by the International Law Commission (ILC). The creation of international treaties has thus been entrusted to a political forum or fora, or to a technical forum in combination with a political one (Wolfrum 'Introduction' in Wolfrum and Röben 1–13, at 3).

54 International treaty law has particularly expanded in areas such as international environmental law; international economic law; international law of the sea; and international criminal law. It seems evident that the norm-creating impetus of international treaties is unbroken. Referring to international treaties as norm-creating means taking it for granted that they actualize the interests of the international community rather than just formulate the individual interests of the States participating in the negotiating process. This invokes the distinction between international treaties which simply accommodate the interests of the participating States and those which pursue community interests (*traités-contrats v traités-lois*). The latter creates a micro-legal system within the general international normative order. But apart from their regulatory effect, international treaties also become an important part of the practice of the States involved, which may lead to the establishment of new customary international law. Additionally, particular international treaties may influence the legal relations with and even amongst non-parties, such as treaties having *erga omnes* effect (Obligations *erga omnes*) or establishing the status of a particular territory or institution. Such international treaties have normative effects beyond the participating parties.

2. Mechanisms for a Progressive Development of Treaty Law

55 Many multilateral international treaties of the recent past have been designed as framework agreements whose provisions are supplemented by further rules. While in the past, international treaties frequently provided for supplementary law-making so as to adapt a legal regime most flexibly to changed needs or circumstances, this approach has now reached a new level as particular institutions are being entrusted with the progressive development of particular treaties (see Conference [Meeting] of States Parties). The system established by each of these international agreements thereby gains an additional dimension. Framework conventions establish 'living' treaty regimes with the prospect of continuous legislative activities. The formats developed display a significant variety.

56 A parallel mechanism, although with less authority, exists concerning international human rights treaties; it also opens the possibility for further development of the respective agreements through interpretation and application. So-called treaty bodies, such as the Human Rights Committee or the Committee on the Elimination of Racial Discrimination (Human Rights, Treaty Bodies; Environmental Treaty Bodies), have the competence to issue general comments/recommendations which have an influence on the interpretation and application of the respective treaty.

3. Development Outside the Treaty-based Order

57 The development of the international normative order does not solely depend upon international treaties. The ILC, as far as State responsibility is concerned, did not initiate the finalization of the norm-creating process which commenced when it was entrusted with the codification of the respective rules. Instead, the ILC recommended that the UN General Assembly only take note of the Articles on State Responsibility rather than submit them to a codification conference, thus relying on the development of customary international law. In other areas, customary international law is also developing or has developed parallel to international treaty law, in part supplementing or modifying it. The relevant mechanism is subsequent State practice in accordance with Art. 31 (3) (b) Vienna Convention on the Law of Treaties.

58 Apart from international treaty law, customary international law, and principles, other mechanisms have become increasingly important for the development of the international normative order. These are norms developed by self-established or politically mandated bodies; treaty-based conferences of parties; treaty bodies; international courts; and international organizations. The rules developed by such institutions have different impacts upon the international normative order. They may constitute restatements of international law or modify international treaty law.

59 For example, the 1994 San Remo Manual on International Law Applicable to Armed Conflict at Sea or the 2009 Harvard Manual on International Law Applicable to Air and Missile Warfare, developed by experts, are designed as a contemporary restatement of the law applicable in armed conflict. State practice will show if they will be accepted. Other similar instruments exist, for example, in international economic law and in international environmental law (eg the Codex Alimentarius or the Code of Conduct for Responsible Fisheries). The Codex Alimentarius, prepared by the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization ('WHO'), is non-binding. Nevertheless, it has a significant influence on the international harmonization of food safety standards, as products consistent with these standards are presumed to be in compliance with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ('SPS Agreement'). The Code of Conduct for Responsible Fisheries is not, as such, a binding instrument, but it is implemented and used by the FAO as an instrument to generate new international norms. It is the particularity of these codes that they have been developed outside the context of an international treaty regime. Their legitimacy and their potential impact upon the international legal order depend upon them being drafted by experts and subsequently accepted in State practice (Wolfrum 'Introduction' in Wolfrum and Röben at 6).

60 One should also consider to what extent the various sources influence each other. Non-treaty law standards may concretize treaty law provisions previously open for interpretation. For example, the *lex mercatoria* is used for that purpose. Non-treaty standards may be restatements of customary international law or may influence the formation of the latter. Also, treaty law influences the formation of customary international law. For example, the Geneva Conventions Additional Protocol I (1977) is considered by several national military manuals as customary international law, while the manuals themselves constitute State practice and contribute to the development of customary international law. International law sources form a unity and, as such, influence and supplement each other. They are, to a varying degree, susceptible to meta-legal and general consideration which is a mechanism for their progressive development, as well as the basis for their sustainable legitimacy.

61 There are norms which may not be considered binding in a formal sense but which are nevertheless expected to be followed (see also Soft Law). In this category belongs, among others, the Basel Accords, which apply among the governors of the G20 central banks.

62 Hortatory rules may also play an important role in the formation of the corpus of international law. Such rules constitute important phases in law-making (Boyle 904). For example, IAEA Guidelines were the basis for the adoption of the 1986 Convention on Early Notification of a Nuclear Accident. UNEP Guidelines were incorporated in the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context. In particular, non-binding norms may establish general principles which may in turn direct the establishment and shape of legally binding international norms. There is even a recent trend towards the enforcement of non-binding rules. This is the case, for example, for the FAO Code of Conduct for Responsible Fisheries.

63 The formerly strict division of sources into legally binding ones and those that lack binding force is getting blurred. Not only do non-binding norms have an impact upon broadly-phrased treaty norms, but they also influence the development and shaping of principles of international law. What is more, there is a growing tendency to implement such non-binding norms. If this

development is consolidated, they will gain an established place in the corpus of international law besides the established sources.

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A MANUAL
OF
INTERNATIONAL LAW

by
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countries with different civilisations in the Near, Middle and Far East. Capitulation treaties provided means of harmonising discrepancies in standards of conduct, especially in the administration of civil and criminal law. In this way, foreigners resident in Asian and African countries were largely exempted from local territorial jurisdiction and made amenable to that of their home States which exercised jurisdiction on the spot through their consular courts or in their own colonial possessions nearby.¹⁸

Finally, matters might be left in the hands of colonial companies such as the Dutch and British East India Companies. They were not considered as themselves endowed with international personality, but were regarded as organs of the States which had granted them their charters. They had, however, wide discretionary powers and used them in concluding treaties with, or making war on, local rulers. Some of these treaties make sense only on the assumption that the colonial company acknowledged the sovereignty and international personality of the local princes concerned. Others are more akin to public contracts under the municipal law of the colonial Power concerned. Today, these aspects of international law are primarily of historical significance. They are by-products of the transition of the European State system from periods of early colonialism and imperialism to the era of a slowly maturing world society.

B. International Law in Sociological Perspective

1. The Structure of International Law

Three features characterise the structure of international law on the level of *unorganised* international society: (a) its universality, (b) its exclusiveness and (c) its individualistic character.

(a) *The Universality of International Law.* On the level of unorganised international society, the geographical scope of international law is universal, in the sense that it extends to the whole world. International law on this level comprises the sum total of the rules from which the seven fundamental and inter-related principles of sovereignty, recognition, consent, good faith, freedom of the seas, responsibility and self-defence can be abstracted.¹⁹

The subjects of international law are, however, free to organise themselves on higher levels of integration. They may, for instance, become parties to a general agreement for the renunciation of resort to war, such as the Kellogg Pact of 1928,²⁰ or join regional or universalist international institutions, such as the Organisation of American States or the United Nations.²¹ They may even coalesce into territorial or functional federations on the model of Switzerland or the European Economic Community.²² Inside such institutional superstructures, international law may

¹⁸ See below, p. 74 *et seq.*

¹⁹ See below, p. 33 *et seq.*

²⁰ See below, p. 151.

²¹ See below, pp. 222 *et seq.* and 273 *et seq.*

²² See below, pp. 45 and 288.

Oxford Public International Law

Nuclear Tests, Australia v France, Judgment on Admissibility, [1974] ICJ Rep 253, ICGJ 133 (ICJ 1974), 20th December 1974, International Court of Justice [ICJ]

Date: 20 December 1974

Content type: International Court Decisions

Jurisdiction: International Court of Justice [ICJ]

Citation(s): [1974] ICJ Rep 253 (Official Citation)

ICGJ 133 (ICJ 1974) (OUP reference)

Product: Oxford Reports on International Law [ORIL]

Module: International Courts of General Jurisdiction [ICGJ]

Parties: Australia
France

Judges/Arbitrators: Manfred Lachs (President); Isaac Forster; André Gros; César Bengzon; Sture Petrn; Charles D Onyeama; Hardy Cross Dillard; Louis Ignacio-Pinto; Federico de Castro; Platon Dmitrievich Morozov; Eduardo Jiménez de Aréchaga; Sir Humphrey Waldock; Nagendra Singh; José Maria Ruda; Sir Garfield Barwick (Judge ad hoc)

Procedural Stage: Admissibility, Judgment

Previous Procedural Stage(s):

Interim Protection, Order; **Nuclear Tests**, *Australia v France*, (1973) **ICJ** Rep 99; ICGJ 130 (**ICJ** 1973), 22 June 1973

Application to Intervene, Order; **Nuclear Tests**, *Australia v France*, (**1974**) **ICJ** Rep 320; ICGJ 131 (**ICJ** **1974**), 20 December **1974**

Subsequent Development(s):

Application to Intervene, Order; **Nuclear Tests**, *Australia v France*, (**1974**) **ICJ** Rep 530; ICGJ 132 (**ICJ** **1974**), 20 December **1974**

Subject(s):

International courts and tribunals, admissibility — International courts and tribunals, procedure — Good faith — Weapons, nuclear — International courts and tribunals, admissibility of claims — Unilateral acts

Core Issue(s):

Whether the Court was called to render the judgment on France's atmospheric nuclear testing in the South Pacific, considering that there was no longer any object in the original dispute since France had agreed to cease further testing.

Decision - English translation

Paragraph numbers have been added to this decision by OUP

Present: President Lachs; Judges Forster, Gros, Benozon, Petrén, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh, Ruda; Judge ad hoc Sir Garfield Barwick ; Registrar Aquarone.

In the **Nuclear Tests** case,

between

Australia,

represented by

Mr. P. Brazil, of the Australian Bar, Officer of the Australian Attorney-General's Department,

as Agent,

assisted by

H.E. Mr. F. J. Blakeney, C.B.E., Ambassador of Australia,

as Co-Agent,

Senator the Honourable Lionel Murphy, Q.C., Attorney-General of Australia,

Mr. M. H. Byers, Q.C., Solicitor-General of Australia,

Mr. E. Lauterpacht, Q.C., of the English Bar, Lecturer in the University of Cambridge,

Professor D. P. O'Connell, of the English, Australian and New Zealand Bars, Chichele Professor of Public International Law in the University of Oxford,

as Counsel,

and by

Professor H. Messel, Head of School of Physics, University of Sydney,

Mr. D. J. Stevens, Director, Australian Radiation Laboratory,

Mr. H. Burmester, of the Australian Bar, Officer of the Attorney-General's Department,

Mr. F. M. Douglas, of the Australian Bar, Officer of the Attorney-General's Department,

Mr: J. F. Browne, of the Australian Bar, Officer of the Department of Foreign Affairs,

Mr. C. D. Mackenzie, of the Australian Bar, Third Secretary, Australian Embassy, The Hague,

as Advisers,

and

the French Republic,

The Court,

composed as above,

delivers the following Judgment:

1. By a letter of 9 May 1973, received in the Registry of the Court the same day, the Ambassador of Australia to the Netherlands transmitted to the Registrar an Application instituting proceedings against France in respect of a dispute concerning the holding of atmospheric **tests** of **nuclear** weapons by the French Government in the Pacific Ocean. In order to found to the jurisdiction of the Court, the Application relied on Article 17 of the General Act for the Pacific Settlement of International Disputes done at Geneva on 26 September 1928, read together with Articles 36, paragraph 1, and 37 of the Statute of the Court, and alternatively on Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the French Government. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Pursuant to Article 31, paragraph 2, of the Statute of the Court, the Government of Australia chose the Right Honourable Sir Garfield Barwick, Chief Justice of Australia, to sit as judge *ad hoc* in the case.

4. By a letter dated 16 May 1973 from the Ambassador of France to the Netherlands, handed by him to the Registrar the same day, the French Government stated that, for reasons set out in the letter and an Annex thereto, it considered that the Court was manifestly not competent in the case, and that accordingly the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list. Nor has an agent been appointed by the French Government.

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

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

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

8. On 24 July 1973, the Registrar addressed the notification provided for in Article 63 of the Statute

to the States, other than the Parties to the case, which were still in existence and were listed in the relevant documents of the League of Nations as parties to the General Act for the Pacific Settlement of International Disputes, done at Geneva on 26 September 1928, which was invoked in the Application as a basis of jurisdiction.

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

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

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

in the Application:

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

And to Order

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

in the Memorial:

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

- (a) the Court has jurisdiction to entertain the dispute, the subject of the Application filed by the Government of Australia on 9 May 1973; and
- (b) the Application is admissible.”

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

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

- (a) the Court has jurisdiction to entertain the dispute the subject of the Application filed by the Government of Australia on 9 May 1973; and
- (b) the Application is admissible

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

13. No pleadings were filed by the French Government, and it was not represented at the oral proceedings; no formal submissions were therefor made by that Government. The attitude of the

French Government with regard to the question of the Court's jurisdiction was however defined in the above-mentioned letter of 16 May 1973 from the French Ambassador to the Netherlands, and the document annexed thereto. The said letter stated in particular that:

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

* * *

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

* * *

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

* * *

16. The present case relates to a dispute between the Government of Australia and the French Government concerning the holding of atmospheric **tests** of **nuclear** weapons by the latter Government in the South Pacific Ocean. Since in the present phase of the proceedings the Court has to deal only with preliminary matters, it is appropriate to recall that its approach to a phase of this kind must be, as it was expressed in the *Fisheries Jurisdiction* cases, as follows:

“The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudice or appear to prejudice any eventual decision on the merits.” (*I.C.J. Reports 1973*, pp. 7 and 54.)

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

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

18. As the United Nations Scientific Committee on the Effects of Atomic Radiation has recorded in

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

* * *

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

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

* * *

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

"(i) Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, read together with Articles 36 (1) and 37 of the Statute of the Court. Australia and the French Republic both acceded to the General Act on 21 May 1931 ...

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

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

23. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be

necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

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

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

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

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

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

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

27. Further light is thrown on the nature of the Australian claim by the reaction of Australia, through its Attorney-General, to statements, referred to in paragraph 20 above, made on behalf of France and relating to **nuclear tests** in the South Pacific Ocean. In the course of the oral proceedings, the Attorney-General of Australia outlined the history of the dispute subsequent to the Order of 22 June 1973, and included in this review mention of a communiqué issued by the Office of

the President of the French Republic on 8 June **1974**. The Attorney-General's comments on this document indicated that it merited analysis as possible evidence of a certain development in the controversy between the Parties, though at the same time he made it clear that this development was not, in his Government's view, of such a nature as to resolve the dispute to its satisfaction. More particularly he reminded the Court that "Australia has consistently stated that it would welcome a French statement to the effect that no further atmospheric **nuclear tests** would be conducted ... but no such assurance was given". The Attorney-General continued, with reference to the communiqué of 8 June:

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

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

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

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

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

29. In the light of these statements, it is essential to consider whether the Government of Australia requests a judgment by the Court which would only state the legal relationship between the Applicant and the Respondent with regard to the matters in issue, or a judgment of a type which in terms requires one or both of the Parties to take, or refrain from taking, some action. Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to "substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced" (*P.C.I.J., Series A, No. 7*, p. 35), but that is not the case here, nor is it a case of the reformulation of submissions by the Court. The Court has on the other hand repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were

advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party. Thus in the *Fisheries* case, the Court said of nine of the thirteen points in the Applicant's submissions: "These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision" (*I.C.J. Reports 1951*, p. 126). Similarly in the *Minquiers and Ecrehos* case, the Court observed that:

"The Submissions reproduced above and presented by the United Kingdom Government consist of three paragraphs, the last two being reasons underlying the first, which must be regarded as the final Submission of that Government. The Submissions of the French Government consist of ten paragraphs, the first nine being reasons leading up to the last, which must be regarded as the final Submission of that Government." (*I.C.J. Reports 1953*, p. 52; see also *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 16.)

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

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

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

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

I should remind the Court that in paragraph 427 of its Memorial the Australian Government made a statement, then completely accurate, to the effect that the French Government had given no indication of any intention of departing from the programme of **testing** planned for **1974** and 1975. That statement will need now to be read in light of the matters to which I now turn and which deal with the official communications by the French Government of its present plans."

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

33. It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties. This is manifestly not the case. The essential material which the Court must examine was introduced into the proceedings by the Applicant itself, by no means incidentally, during the course of the hearings, when it drew the Court's attention to a statement by the French authorities made prior to that date, submitted the documents containing it and presented an interpretation of its character, touching particularly upon the question whether it contained a firm assurance. Thus both the statement and the Australian interpretation of it are before the Court pursuant to action by the Applicant. Moreover, the Applicant subsequently publicly expressed its comments (see paragraph 28 above) on statements made by the French authorities since the closure of the oral proceedings. The Court is therefore in possession not only of the statements made by French authorities concerning the cessation of atmospheric nuclear testing, but also of the views of the Applicant on them. Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim *audi alteram partem*, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar. Thus the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The Court, having taken note of the Applicant's comments, and feeling no obligation to consult the Parties on the basis for its decision finds that the reopening of the oral proceedings would serve no useful purpose.

34. It will be convenient to take the statements referred to above in chronological order. The first statement is contained in the communiqué issued by the Office of the President of the French Republic on 8 June 1974, shortly before the commencement of the 1974 series of French nuclear tests:

“The Decree reintroducing the security measures in the South Pacific nuclear test zone has been published in the Official Journal of 8 June 1974.

The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed.”

A copy of the communiqué was transmitted with a Note dated 11 June 1974 from the French Embassy in Canberra to the Australian Department of Foreign Affairs, and as already mentioned,

the text of the communiqué was brought to the attention of the Court in the course of the oral proceedings.

35. In addition to this, the Court cannot fail to take note of a reference to a document made by counsel at a public hearing in the proceedings, parallel to this case, instituted by New Zealand against France on 9 May 1973. At the hearing of 10 July **1974** in that case, the Attorney-General of New Zealand, after referring to the communiqué of 8 June **1974**, mentioned above, stated that on 10 June **1974** the French Embassy in Wellington sent a Note to the New Zealand Ministry of Foreign Affairs, containing a passage which the Attorney General read out, and which, in the translation used by New Zealand, runs as follows:

“France, at the point which has been reached in the execution of its programme of defence by **nuclear** means, will be in a position to move to the stage of underground **tests**, as soon as the **test** series planned for this summer is completed.

Thus the atmospheric **tests** which are soon to be carried out will, in the normal course of events, be the last of this type.”

36. The Court will also have to consider the relevant statements made by the French authorities subsequently to the oral proceedings: on 25 July **1974** by the President of the Republic; on 16 August **1974** by the Minister of Defence; on 25 September **1974** by the Minister for Foreign Affairs in the United Nations General Assembly; and on 11 October **1974** by the Minister of Defence.

37. The next statement to be considered, therefore, will be that made on 25 July at a press conference given by the President of the Republic, when he said :

“... on this question of **nuclear tests**, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French **nuclear testing** would continue. I had myself made it clear that this round of atmospheric **tests** would be the last, and so the members of the Government were completely informed of our intentions in this respect...”

38. On 16 August **1974**, in the course of an interview on French television, the Minister of Defence said that the French Government had done its best to ensure that the **1974 nuclear tests** would be the last atmospheric **tests**.

39. On 25 September **1974**, the French Minister for Foreign Affairs, addressing the United Nations General Assembly, said:

“We have now reached a stage in our **nuclear** technology that makes it possible for us to continue our programme by underground **testing**, and we have taken steps to do so as early as next year.”

40. On 11 October **1974**, the Minister of Defence held a press conference during which he stated twice, in almost identical terms, that there would not be any atmospheric **tests** in 1975 and that France was ready to proceed to underground **tests**. When the comment was made that he had not added “in the normal course of events”, he agreed that he had not. This latter point is relevant in view of the passage from the Note of 10 June **1974** from the French Embassy in Wellington to the Ministry of Foreign Affairs of New Zealand, quoted in paragraph 35 above, to the effect that the atmospheric **tests** contemplated “will, in the normal course of events, be the last of this type”. The Minister also mentioned that, whether or not other governments had been officially advised of the decision, they could become aware of it through the press and by reading the communiqués issued by the Office of the President of the Republic.

41. In view of the foregoing, the Court finds that France made public its intention to cease the

conduct of atmospheric **nuclear tests** following the conclusion of the **1974** series of **tests**. The Court must in particular take into consideration the President's statement of 25 July **1974** (paragraph 37 above) followed by the Defence Minister's statement on 11 October **1974** (paragraph 40). These reveal that the official statements made on behalf of France concerning future **nuclear testing** are not subject to whatever proviso, if any, was implied by the expression "in the normal course of events [*normalement*]".

* * *

42. Before considering whether the declarations made by the French authorities meet the object of the claim by the Applicant that no further atmospheric **nuclear tests** should be carried out in the South Pacific, it is first necessary to determine the status and scope on the international plane of these declarations.

43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

44. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

45. With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*:

"Where ... as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it."
(**I.C.J.** Reports 1961, p. 31.)

The Court further stated in the same case : "... the sole relevant question is whether the language employed in any given declaration does reveal a clear intention..." (*ibid.*, p. 32).

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

* * *

47. Having examined the legal principles involved, the Court will now turn to the particular statements made by the French Government. The Government of Australia has made known to the Court at the oral proceedings its own interpretation of the first such statement (paragraph 27 above). As to subsequent statements, reference may be made to what was said in the Australian Senate by the Attorney-General on 26 September **1974** (paragraph 28 above). In reply to a question concerning reports that France had announced that it had finished atmospheric **nuclear testing**, he said that the statement of the French Foreign Minister on 25 September (paragraph 39 above) “falls far short of an undertaking that there will be no more atmospheric **tests** conducted by the French Government at its Pacific **Tests Centre**” and that France was “still reserving to itself the right to carry out atmospheric **nuclear tests**” so that “In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric **tests**”.

48. It will be observed that Australia has recognized the possibility of the dispute being resolved by a unilateral declaration, of the kind specified above, on the part of France, and its conclusion that in fact no “commitment” or “firm, explicit and binding undertaking” had been given is based on the view that the assurance is not absolute in its terms, that there is a “distinction between an assertion that **tests** will go underground and an assurance that no further atmospheric **tests** will take place”, that “the possibility of further atmospheric **testing** taking place after the commencement of underground **tests** cannot be excluded” and that thus “the Government of France is still reserving to itself the right to carry out atmospheric **nuclear tests**”. The Court must however form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text.

49. Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October **1974**), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.

50. The unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes*, even though the first of them was communicated to the Government of Australia. As was observed above, to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required. The general nature and characteristics of these statements are decisive for the evaluation of the legal implications, and it is to the interpretation of the statements that the Court must now proceed. The Court is entitled to presume, at the outset, that these statements were not made *in vacuo*, but in relation to the **tests** which constitute the very object of the present proceedings, although France has not appeared in the case.

51. In announcing that the **1974** series of atmospheric **tests** would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these **tests**. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic, in deciding upon the effective cessation of atmospheric **tests**, gave an

undertaking to the international community to which his words were addressed. It is true that the French Government has consistently maintained, for example in a Note dated 7 February 1973 from the French Ambassador in Canberra to the Prime Minister and Minister for Foreign Affairs of Australia, that it “has the conviction that its **nuclear** experiments have not violated any rule of international law”, nor did France recognize that it was bound by any rule of international law to terminate its **tests**, but this does not affect the legal consequences of the statements examined above. The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.

52. Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further **nuclear tests** in the atmosphere in the South Pacific.

53. The Court finds that no question of damages arises in the present case, since no such claim has been raised by the Applicant either prior to or during the proceedings, and the original and ultimate objective of Applicant has been to seek protection “against any further atmospheric **test**” (see paragraph 28 above).

54. It would of course have been open to Australia, if it had considered that the case had in effect been concluded, to discontinue the proceedings in accordance with the Rules of Court. If it has not done so, this does not prevent the Court from making its own independent finding on the subject. It is true that “the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement” (*Factory at Chorzow (Merits), P.C.I.J., Series A, No. 17, p. 51*). However, in the present case, that is not the situation before the Court. The Applicant has clearly indicated what would satisfy its claim, and the Respondent has independently taken action; the question for the Court is thus one of interpretation of the conduct of each of the Parties. The conclusion at which the Court has arrived as a result of such interpretation does not mean that it is itself effecting a compromise of the claim; the Court is merely ascertaining the object of the claim and the effect of the Respondent's action, and this it is obliged to do. Any suggestion that the dispute would not be capable of being terminated by statements made on behalf of France would run counter to the unequivocally expressed views of the Applicant both before the Court and elsewhere.

55. The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since “whether there exists an international dispute is a matter for objective determination” by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950, p. 74*). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means. If the declarations of France concerning the effective cessation of the **nuclear tests** have the significance described by the Court, that is to say if they have caused the dispute to disappear, all the necessary consequences must be drawn from this finding.

56. It may be argued that although France may have undertaken such an obligation, by a unilateral declaration, not to carry out atmospheric **nuclear tests** in the South Pacific Ocean, a judgment of the Court on this subject might still be of value because, if the judgment upheld the Applicant's contentions, it would reinforce the position of the Applicant by affirming the obligation of the Respondent. However, the Court having found that the Respondent has assumed an obligation

as to conduct, concerning the effective cessation of **nuclear tests**, no further judicial action is required. The Applicant has repeatedly sought from the Respondent an assurance that the **tests** would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute having disappeared, the claim advanced by Australia no longer has any object. It follows that any further finding would have no *raison d'être*.

57. This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others. Article 38 of the Court's Statute provides that its function is "to decide in accordance with international law such disputes as are submitted to it"; but not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function.

58. The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which "circumstances that have ... arisen render any adjudication devoid of purpose" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.

59. Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment.

* * *

60. Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January **1974**, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request.

* * *

61. In its above-mentioned Order of 22 June 1973, the Court stated that the provisional measures therein set out were indicated "pending its final decision in the proceedings instituted on 9 May 1973 by Australia against France". It follows that such Order ceases to be operative upon the delivery of the present Judgment, and that the provisional measures lapse at the same time.

* * *

62. For these reasons,

The Court,

by nine votes to six,

finds that the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and seventy-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Australia and the Government of the French Republic, respectively.

(Signed) Manfred Lachs,

President.

(Signed) S. Aquarone,

Registrar.

President Lachs makes the following declaration :

President Lachs

- 1** Good administration of justice and respect for the Court require that the outcome of its deliberations be kept in strict secrecy and nothing of its decision be published until it is officially rendered. It was therefore regrettable that in the present case, prior to the public reading of the Court's Order of 22 June 1973, a statement was made and press reports appeared which exceeded what is legally admissible in relation to a case *sub judice*.
- 2** The Court was seriously concerned with the matter and an enquiry was ordered in the course of which all possible avenues accessible to the Court were explored.
- 3** The Court concluded, by a resolution of 21 March **1974**, that its investigations had not enabled it to identify any specific source of the statements and reports published.
- 4** I remain satisfied that the Court had done everything possible in this respect and that it dealt with the matter with all the seriousness for which it called.

Judges Bengzon, Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock make the following joint declaration:

Judges Bengzon, Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock

- 1** Certain criticisms have been made of the Court's handling of the matter to which the President alludes in the preceding declaration. We wish by our declaration to make it clear that we do not consider those criticisms to be in any way justified.
- 2** The Court undertook a lengthy examination of the matter by the several means at its disposal : through its services, by convoking the Agent for Australia and having him questioned, and by its own investigations and enquiries. Any suggestion that the Court failed to treat the matter with all the seriousness and care which it required is, in our opinion, without foundation. The seriousness with which the Court regarded the matter is indeed reflected and emphasized in the communiques which it issued, first on 8 August 1973 and subsequently on 26 March **1974**.
- 3** The examination of the matter carried out by the Court did not enable it to identify any specific source of the information on which were based the statements and press reports to which the President has referred. When the Court, by eleven votes to three, decided to conclude its examination it did so for the solid reason that to pursue its investigations and inquiries would in its view, be very unlikely to produce further useful information.
- 4** Judges Forster, Gros, Petrán and Ignacio-Pinto append separate opinions to the Judgment of the Court.

5 Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock append a joint dissenting opinion, and Judge de Castro and Judge *ad hoc* Sir Garfield Barwick append dissenting opinions to the Judgment of the Court.

(Initialled) M.L.

(Initialled) S.A.

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President Lachs

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3 The examination of the matter carried out by the Court did not enable it to identify any specific source of the information on which were based the statements and press reports to which the President has referred. When the Court, by eleven votes to three, decided to conclude its examination it did so for the solid reason that to pursue its investigations and inquiries would in its view, be very unlikely to produce further useful information.

Separate Opinion of Judge Forster

Judge Forster

[Translation]

1 I voted in favour of the Judgment of 20 December **1974** whereby the International Court of Justice has brought to an end the proceedings instituted against France by Australia on account of the French **nuclear tests** carried out at Mururoa, a French possession in the Pacific.

2 The Court finds in this Judgment that the Australian claim “no longer has any object and that” it “is therefore not called upon to give a decision thereon”.

3 Thus end the proceedings.

4 I wish, however, to make the following clear :

5 That the Australian claim was without object was apparent to me from the very first, and not merely subsequent to the recent French statements : in my view it lacked object *ab initio*, and radically.

6 The recent French statements adduced in the reasoning of the Judgment do no more than supplement (to useful purpose, I admit) what I conceived to be the legal arguments for removal of the case from the Court's list. But there would be no point in rehearsing these arguments now that the proceedings are over.

7 I wish, finally, to state in terms that I personally have noted nothing in the French statements which could be interpreted as an admission of any breach of positive international law ; neither have I observed in them anything whatever bearing any resemblance to a concession wrested from France by means of the judicial proceedings and implying the least abandonment of that absolute sovereignty which France, like any other State, possesses in the domain of its national defence.

8 As for the transition from atmospheric to underground **tests** , I see it simply as a technical step forward which was due to occur ; that, and no more.

(Signed) I. Forster.

Separate Opinion of Judge Gros

Judge Gros

[Translation]

Although my opinion on this case is not based on the Court's reasoning as set out in the grounds of the Judgment, I voted in favour of the operative clause because the Judgment puts an end to the action commenced by the Applicant, and this coincides with the views of those who took the view, as long ago as the first phase of the Court's study of the case in June 1973, that there was no legal dispute. By finding that, today at least, the case between the two States no longer has any object, the Court puts an end to it by other means.

The Court has taken as legal basis of its Judgment the need to settle this question of the existence of the object of the dispute as absolutely preliminary, even in relation to questions concerning its jurisdiction and other questions relating to admissibility. The Judgment only deals with the disappearance of the object of the claim, and no decision has been taken on the questions concerning the Court's lack of jurisdiction or the inadmissibility of the claim; it is thus inappropriate to deal with these questions. But there remains the problem of the non-existence, from the outset of the case submitted to the Court, of any justiciable dispute, and on this point I find it necessary to make some observations.

1. In order to ascertain whether the proceedings were without foundation at the outset, the Application instituting proceedings, dated 9 May 1973, which defines the object of the claim, must

clearly be taken as point of departure. The Applicant asked the Court to “order that the French Republic shall not carry out any further such **tests**” [sc., atmospheric **tests** of **nuclear** weapons in the South Pacific]. This request is based on 22 lines of legal argument which makes up for its brevity by observing finally that, for these reasons “or for any other reason that the Court deems to be relevant, the carrying out of further ... **tests** is not consistent with applicable rules of international law”. I have had occasion in another case to recall that submissions, in the strict sense, have frequently been confused with reasons in support, a practice which has been criticized by Judge Basdevant (*I.C.J. Reports 1974*, pp. 137 ff.); such confusion still occurs however, and is particularly apparent in this case. In order to have these **nuclear tests** prohibited for the future, the Applicant had to base its contention, however elliptically, on rules of law which were opposable to the Respondent, rules which in its Application it left it to the Court to discover and select. But it is not apparent how it is possible to find in these few lines which precede the formulation of the claim, and which are both formally and logically distinct from it, a request for a declaratory judgment by the Court as to the unlawfulness of the **tests**. The question raised is that of prohibition of French **tests** in the South Pacific region inasmuch as all **nuclear tests**, wherever and by whoever conducted, are, according to the Applicant, unlawful. Legal grounds, i.e., the unlawfulness of the **tests**, therefore had to be shown in order to achieve the object of the claim, namely a judicial prohibition. The submission, in the strict sense, was the prayer for prohibition, and the unlawfulness was the reasoning justifying it.

2. The rule is that the Court is seized of the precise object of the claim in the way in which this has been formulated. The present case consisted in a claim for prohibition of atmospheric **tests** on the ground that they were unlawful. This is a procedure for establishing legality (*contentieux de légalité*), not a procedure for establishing responsibility (*contentieux de responsabilité*), with which the Application does not concern itself. In order to succeed the Applicant had to show that its claim for prohibition of French atmospheric **tests** was based on conduct by the French Government which was contrary to rules of international law which were opposable to that Government.

But it is not sufficient to put a question to the Court, even one which as presented is apparently a legal question, for there to be, objectively, a dispute. The situation is well described by the words of Judge Morelli: “The mere assertion of the existence of a dispute by one of the parties does not prove that such a dispute really exists” (*I.C.J. Reports 1962*, p. 565; see also pp. 564 and 566–568), and even at the time of the Order of 22 June 1973 I had raised this question, when I referred to “an unreal dispute” (*I.C.J. Reports 1973*, p. 118) and “a dispute which [a State] alleges not to exist” (*ibid.*, p. 120). I then emphasized the preliminary nature, particularly in a case of failure to appear, of examination of the question of the real existence of the dispute before a case can be dealt with by the Court in the regular exercise of its judicial function. By deciding to effect such preliminary examination, after many delays, and without any reference to the voluntary absence of one of the Parties, the Court is endorsing the principle that examination of the question of the reality of the dispute is necessarily a matter which takes priority. This point is thus settled. There was nothing in the Court's procedure to prevent examination in June 1973 of the question whether the dispute described to the Court by the Applicant was, and had been from the outset, lacking in any real existence.

3. When several reasons are invoked before the Court in support of the contention that a case may not be judged on the merits—whether these reasons concern lack of jurisdiction or inadmissibility—the Court has always taken the greatest possible care not to commit itself either to any sort of classification of these various grounds, any of which may lead to dismissal of the claim, or to any sort of ranking of them in order. In the *Northern Cameroons* case, the Court refused to establish any system for these problems, or to define admissibility and interest, while analysing in detail the facts of the case which enabled it to arrive at its decision (cf. *I.C.J. Reports 1963*, p. 28):

“The arguments of the Parties have at times been at cross-purposes because of the absence of a common meaning ascribed to such terms as ‘interest’ and ‘admissibility’. The Court recognizes that these words in differing contexts may have varying connotations but it does not find it necessary in the present case to explore the meaning of these terms. For the purposes of the present case, a factual analysis undertaken in the light of certain guiding principles may suffice to conduce to the resolution of the issues to which the Court directs its attention.”

And further on, at page 30 : “... it is always a matter for the determination of the Court whether its judicial functions are involved.”

Thus the principle which the Court applies is a common-sense one : if a finding is sufficient in itself to settle the question of the Court's competence, in the widest sense of the word, that is to say to lead to the conclusion that it is impossible to give judgment in a case, there is no need to proceed to examine other grounds. For there to be any proceedings on the merits, the litigation must have an object capable of being the subject of a judgment consistently with the role attributed to the Court by its Statute; in the present case, where numerous objections as to lack of jurisdiction and inadmissibility were raised, the question of the absence of any object of the proceedings was that which had to be settled first for this very reason, namely that if it were held to be well founded, the case would disappear without further discussion. The concept of a merits phase has no meaning in an unreal case, any more than has the concept of a jurisdiction/admissibility phase, still less that of an interim measures phase, on the fallacious pretext that such measures in no way prejudge the final decision (on this point, see dissenting opinion appended to the Order of 22 June 1973, p. 123). In a case in which everything depends on recognizing that an Application is unfounded and has no *raison d'être*, and that there was no legal dispute of which the Court could be seised, a marked taste for formalism is required to rely on the inviolability of the usual categories of phases. To do so would be to erect the succession of phases in examination of cases by the Court into a sort of ritual, totally unjustified in the general conception of international law, which is not formalistic. These are procedural practices of the Court, which organizes its procedure according to the requirements of the interests of justice. Article 48 of the Statute, by entrusting the “conduct of the case” to the Court, did not impose any limitation on the exercise of this right by subjecting it to formalistic rules, and the institution of phases does not necessarily require successive stages in the examination of every case, either for the parties or for the Court.

4. To wait several years—more than a year and a half has already elapsed—in order to reach the unhurried conclusion that a court is competent merely because the two States are formally bound by a jurisdictional clause, without examining the scope of that clause, and then to join the questions of admissibility to the merits, only subsequently to arrive (perhaps) at the conclusion on the merits that there were no merits, would not be a good way of administering justice.

The observation that, on this view of the matter, a State which declined to appear would more rapidly be rid of proceedings than a State which replied by raising preliminary objections, is irrelevant ; apart from the problem of non-appearance (on this point cf. paras. 23 to 29 below), when the hypothesis arises that the case is an unreal one, with the possible implication that there was a misuse of the right of seising the Court, there is no obvious reason why a decision should be delayed unless from force of habit or routine.

In the Judgment of 21 December 1962 in the *South West Africa* cases, (*I.C.J. Reports* 1962, p. 328), the Court, before examining the preliminary objections to jurisdiction and admissibility raised by the Respondent, itself raised *proprio motu* the problem of the existence of a genuine dispute between the Applicants and the Respondent (see also the opinion of Judge Morelli on this point, *I.C.J. Reports* 1962, pp. 564–568).

5. The facts of the case leave no room for doubt, in my opinion, that there was no dispute even at the time of the filing of the Application.

In the series of diplomatic Notes addressed to the French Government by the Australian Government between 1963 and the end of 1972 (Application, pp. 34–48), at no time was the argument of the unlawfulness of the French **tests** advanced to justify a claim for cessation of such **tests**, based on rules of international law opposable to the French Government. The form of protests used expresses “regrets” that the French Government should carry out such **tests**, and mention is made of the “deep concern” aroused among the peoples of the area (Application, pp. 42, 44 and 46). So little was it thought on the Australian side that there was a rule which could be invoked against France’s **tests** that it is said that the Government of Australia would like “to see universally applied and accepted” the 1963 **test** ban treaty (Note of 2 April 1970, Application, p. 44; in the same terms exactly, Note of 20 April 1971, Application, p. 46, and Note of 29 March 1972, Application, p. 48). There is no question of unlawfulness, nor of injury caused by the **tests** and international responsibility, but merely of opposition in principle to all **nuclear tests** by all States, with complete consistency up to the Note of 3 January 1973, in which for the first time the Australian Government invites the French Government “to refrain from any further ... **tests**”, which it regards as unlawful (Application, Ann. 9, p. 51); this, then, was the Note which, by a complete change of attitude, paved the way to the lawsuit.

The reason for the change was given by the Australian Government in paragraph 14 of its Application :

“In its Note [of 3 January 1973], the Australian Government indicated explicitly that in its view the French **tests** were unlawful and unless the French Government could give full assurances that no further **tests** would be carried out, the only course open to the Australian Government would be the pursuit of appropriate international legal remedies. In thus expressing more forcefully the point of view previously expounded on behalf of Australia, the Government was reflecting very directly the conviction of the Australian people who had shortly before elected a Labour Administration, pledged to a platform which contained the following statement : ‘Labour opposes the development, proliferation, possession and use of **nuclear**, chemical and bacteriological weapons’.” (Application, pp. 8–10.)

In the succeeding paragraph 15 the following will also be noticed : “The Government of Australia claimed [in its Notes of 3 January and 7 February 1973] that the continuance of **testing** by France is illegal and called for the cessation of **tests** .”

6. Thus the basis of the discussion is no longer the same; it is “claimed” that the **tests** are unlawful, and France is “invited” to stop them because the Labour Party is opposed to the development, possession and use of **nuclear** weapons, and the Government is bound by its electoral programme. This reason, the change of government, is totally irrelevant; a State remains bound by its conduct in international relations, whatever electoral promises may have been made. If for ten years Australian governments have treated **tests** in the Pacific as unwelcome but not unlawful, subject to certain protests on principle and demonstrations of concern, an electoral programme is not sufficient argument to do away with this explicit appreciation of the legal aspects of the situation.

The Applicant, as it happens, perceived in advance that its change of attitude gave rise to a serious problem, and it endeavoured in the Application to cover it up by saying that it had done no more than express “more forcefully the point of view previously expounded on behalf of Australia”. It can easily be shown that the previous viewpoint was totally different. Apart from the diplomatic Notes of the ten years prior to 1973, which are decisive, and which show that the Government of Australia did not invoke any legal grounds to oppose the decision of the French Government to conduct **tests** in the South Pacific region, it will be sufficient to recall that Australia has associated itself with various atmospheric explosions above or in the vicinity of its own territory, and that by its conduct it has expressed an unequivocal view on the lawfulness of those **tests** and those carried

out by other States in the Pacific.

7. The first atmospheric **nuclear** explosion effected by the United Kingdom occurred on 3 October 1952 in the Montebello Islands, which are situated near the north-west coast of Australia. It was the Australian Minister of Defence who announced that the **test** had been successful, and the Prime Minister of Australia described it as “one further proof of the very important fact that scientific development in the British Commonwealth is at an extremely high level” (*Keesing's Contemporary Archives*, 11–18 October 1952, p. 12497). The Prime Minister of the United Kingdom sent a message of congratulation to the Prime Minister of Australia. The Navy and Air Force and other Australian government departments were associated with the preparation and execution of the **test**; three safety-zones were forbidden for overflight and navigation, on pain of imprisonment and fines.

On 15 October 1953 a further British **test** was carried out at Woomera in Australia, with a new forbidden zone of 80,000 square miles. The British Minister of Supply, addressing the House of Commons on 24 June 1953, announced the new series of **tests**, which had been prepared in collaboration with the Australian Government and with the assistance of the Australian Navy and Air Force (*Keesing's Contemporary Archives* 1953, p. 13222).

Two further series of British **tests** took place in 1956, one in the Montebello Islands (on 16 May and 19 June), the other at Maralinga in South Australia (27 September, 4, 11 and 21 October). The acting Prime Minister of Australia, commenting on fall-out, stated that no danger to health could arise therefrom. Australian military personnel were present as observers during the second series of **tests** (*Keesing's Contemporary Archives*, 1956, p. 14940). The British Government stated on 7 August 1956 that the Australian Government had given full co-operation, and that various Australian government departments had contributed valuable assistance under the co-ordinating direction of the Australian Minister for Supply. The second **test** of this series was observed by that Minister and members of the Australian Parliament (*Keesing's Contemporary Archives*, 1956, p. 15248).

The British Prime Minister stated on 7 June 1956:

“Her Majesty's Governments in Australia and New Zealand have agreed to make available to the task force various forms of aid and ancillary support from Australian and New Zealand territory. We are most grateful for this.” (*Hansard*, House of Commons, 1956, Col. 1283.)

8. Active participation in repeated atmospheric **tests** over several years in itself constitutes admission that such **tests** were in accordance with the rules of international law. In order to show that the present **tests** are not lawful, an effort has been made to argue, first, that what is laudable on the part of some States is execrable on the part of others and, secondly, that atmospheric **tests** have become unlawful since the time when Australia itself was making its contribution to **nuclear** fall-out.

9. On 3 March 1962, after the Government of the United States had decided to carry out **nuclear tests** in the South Pacific, the Australian Minister for External Affairs said that :

“... the Australian Government ... has already made clear its view that if the United States should decide it was necessary for the security of the free world to carry out **nuclear tests** in the atmosphere, then the United States must be free to do so” (Application, Ann. 3, p. 36).

A few days after this statement, on 16 March 1962, the Australian Government gave the United States its permission to make use of Christmas Island (where more than 20 **tests** were carried out between 24 April and 30 June, while **tests** at very high altitude were carried out at Johnston Island

from 9 July to 4 November 1962).

In an aide-mémoire of 9 September 1963 the Australian Government likewise stated :

“Following the signature of the Treaty Banning **Nuclear Tests** in the Atmosphere, in Outer Space and Under Water, the Australian Government also recognizes that the United States must take such precautions as may be necessary to provide for the possibility that **tests** could be carried out in the event, either of a breach of the Treaty, or of some other States exercising their right to withdraw from the Treaty.” (*Ibid.*, p. 38.)

In contrast, five years later, with solely the French and Chinese **tests** in mind, the Australian Government wrote :

“On 5 April 1968, in Wellington, New Zealand, the Australia-New Zealand-United States (ANZUS) Council, included the following statement in the communique issued after the meeting :

‘Noting the continued atmospheric **testing** of **nuclear** weapons by Communist China and France, the Ministers reaffirmed their opposition to all atmospheric **testing** of **nuclear** weapons in disregard of world opinion as expressed in the **Nuclear Test Ban Treaty.**’ ” (*Ibid.*, Ann. 5, p. 42.)

10. On another occasion the Australian Government had already evinced the same sense of discrimination. In 1954, in the Trusteeship Council, when certain damage caused the Marshall Islands by the **nuclear tests** of the administering authority was under consideration, the Australian delegate could not go along with the views of any of the delegations who objected to the **tests** in principle.

11. It is not unjust to conclude that, in the eyes of the Australian Government, what should be applauded in the allies who might protect it is to be frowned upon in others : *Quod licet Jovi non licet bovi*. It is at the time when the delegate of the United States has been revealing to the United Nations that his Government possesses the equivalent of 615,385 times the original Hiroshima bomb (First Committee, 21 October **1974**) that the Australian Government seeks to require the French Government to give up the development of atomic weapons.

It remains for me briefly to show how this constant attitude of the Australian Government, from 1963 to the end of 1972, i.e., up to the change described in paragraph 5 above, forms a legal bar to the Applicant's appearing before the Court to claim that, among **nuclear tests**, certain can be selected to be declared unlawful and they alone prohibited. Indeed the Court, in June 1973, already had a choice among numerous impediments on which it might have grounded a finding that the case was without object. For simplicity's sake let us take the major reason : the principle of the equality of States.

12. The Applicant's claim to impose a certain national defence policy on another State is an intervention in that State's internal affairs in a domain where such intervention is particularly inadmissible. The United Kingdom Government stated on this point on 2 July 1973 as follows :

“... we are not concerned ... with the question of whether France should or should not develop her **nuclear** power. That is a decision entirely for France ...” (*Hansard*, col. 60).

In *The Function of Law in the International Community* (Oxford 1933, p. 188) Mr. (later Sir) Hersch Lauterpacht wrote :

“... it means stretching judicial activity to the breaking-point to entrust it with the determination of the question whether a dispute is political in the meaning that it involves the independence, or the vital interests, or the honour of the State. It is therefore doubtful

whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security or vital interests. As we have seen, the interests involved are of a nature so subjective as to exclude the possibility of applying an objective standard not only in regard to general arbitration treaties, but also in regard to each individual dispute.”

The draft law which the French Government laid before its Parliament in 1929 to enable its accession to the General Act of Geneva of 26 September 1928 has been drawn to the Court's attention ; this draft embodied a formal reservation excluding “disputes connected with claims likely to impair the organization of the national defence”. On 11 July 1929 the rapporteur of the parliamentary Committee on Foreign Affairs explained that the reservation was unnecessary :

“Moreover the very terms in which the *exposé des motifs* presents it show how unnecessary it is. ‘In the absence of contractual provisions arising out of existing treaties or such treaties as may be concluded at the instigation of the League of Nations in the sphere of armaments limitation,’ says the text: ‘disputes connected with claims likely to impair the organization of the national defence.’ But, precisely because these provisions do not exist, how could an arbitration tribunal rule upon a conflict of this kind otherwise than by recognizing that each State is at present wholly free to organize its own national defence as it thinks fit? Is it imagined that the action of some praetorian arbitral case-law might oust or at any rate range beyond that of Geneva? That would seem to be a somewhat chimaerical danger.” (*Documents parlementaires: Chambre des députés*, 1929, Ann. 1368, pp. 407 f.; Ann. 2031, p. 1143.)

The *exposé des motifs* of the draft law of accession, lays strong emphasis on the indispensability of the competence of the Council of the League of Nations for the “appraisal of the political or moral factors likely to be relevant to the settlement of certain conflicts not strictly legal in character”, disputes “which are potentially of such political gravity as to render recourse to the Council indispensable” (*ibid.*, p. 407). Such was the official position of the French Government upon which the rapporteur of the Foreign Affairs Committee likewise sheds light here when he stresses the combination of resort to the Council and judicial settlement (*ibid.*, p. 1142).

13. It is not unreasonable to believe that the present-day world is still persuaded of the good sense of the observations quoted in the preceding paragraph (cf. the Luxembourg arrangement of 29 January 1966, between the member States of the European Economic Community, on “very important interests”). But there is more than one negative aspect to the want of object of the Australian claim. The principle of equality before the law is constantly invoked, reaffirmed and enshrined in the most solemn texts. This principle would become meaningless if the attitude of “to each his rule” were to be tolerated in the practice of States and in courts. The proper approach to this matter has been exemplified in Sir Gerald Fitzmaurice's special report to the Institute of International Law : “The Future of Public International Law” (1973, pp. 35–41).

In the present case the Applicant has endeavoured to present to the Court, as the object of a legal dispute, a request for the prohibition of acts in which the Applicant has itself engaged, or with which it has associated itself, while maintaining that such acts were not only lawful but to be encouraged for the defence of a certain category of States. However, the Applicant has overlooked part of the statement made by the Prime Minister of the United Kingdom in the House of Commons on 7 June 1956, when he expressed his thanks to Australia for its collaboration in the British **tests** (para. 7 above). The Prime Minister also said :

“Certainly, I do not see any reason why this country should not make experiments similar to those that have been carried out by both the United States and Soviet Russia. That is all that we are doing. I have said that we are prepared to work out systems of limitation. Personally, I think it desirable and I think it possible.” (*Hansard*, col. 1285.)

On 2 July 1973, the position of the British Government was thus analysed by the Attorney-General :

“... even if France is in breach of an international obligation, that obligation is not owed substantially to the United Kingdom, and there is no substantive legal right of the United Kingdom which would seem to be infringed” (*Hansard*, col. 99).

And that despite the geographical position in the Pacific of Pitcairn Island.

The Applicant has disqualified itself by its conduct and may not submit a claim based on a double standard of conduct and of law. What was good for Australia along with the United Kingdom and the United States cannot be unlawful for other States. The Permanent Court of International Justice applied the principle “*allegans contraria non audiendus est*” in the case of *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, page 25.

14. In the arguments devised in 1973 for the purposes of the present case, it was also claimed that the difference in the Australian Government's attitude vis-à-vis the French Government was to be explained by the fact that, at the time of the explosions with which the Australian Government had associated itself and which it declared to be intrinsically worthy of approval, awareness of the danger of fall-out had not yet reached the acute stage. One has only to read the reports of the United Nations Scientific Committee on the Effects of Atomic Radiation, a committee set up by the General Assembly in 1955, to see that such was not the case. While it is true to say that more abundant and accurate information has become available over the years, the reports of this committee have constantly recalled that : “Those [**tests** of **nuclear** weapons] carried out before 1963 still represent by far the largest series of events leading to global radio-active contamination.” (UNSCEAR Report 1972, Chap. I, p. 3.)

As for awareness of particular risks to Australia, the National Radiation Advisory Committee was set up by the Australian Government in May 1957 for the purpose of advising on all questions concerning the effects of radiation on the Australian population. The Court has had cognizance of the reports of 1967 (two reports), 1969, 1971 and 1972 ; the report of March 1967 indicates that the previous report dated from 1965, and that it dealt in detail with the question of fall-out over the Australian environment and the effects upon man :

“The Committee at that time was satisfied that the proposed French **nuclear** weapons **tests** in the South Pacific Ocean were unlikely to lead to a significant hazard to the health of the Australian population.” (Report to the Prime Minister, March 1967, para. 3.)

This same form of words is repeated in paragraph 11 of the March 1967 report, in reference to the first series of French **tests** , which took place in the period July–October 1966, and also in paragraph 11 of the report for December 1967, issued following a study of the effects of the second series of **tests** (June–July 1967) and taking radiation doses from both series into account. The report which the Australian NRAC addressed to the Prime Minister in March 1969 concerned the French **tests** of July–September 1968 and repeated in its paragraph 12 the conclusions cited above from paragraph 3 of the March 1967 report. The Committee's March 1971 report recalls in its paragraph 3 that fall-out from all the French **tests** , in 1966, 1967 and 1968, did not constitute a hazard to the health of the Australian population. The form of words used in paragraph 12 of that report comes to the traditional conclusion as to the **tests** held in 1970. The absence of risk is again recognized in the report issued by the NRAC in July 1972 (paras. 8, 9 and 11). When, however, the new administration took office in Australia, this scientific committee was dissolved. On 12 February 1973 the Prime Minister requested a report of the Australian Academy of Science, the Council of which appointed a committee to report on the biological effects of fall-out; the conclusions of this report were considered at a joint meeting with French scientists in May 1973, shortly before the filing of the Application instituting proceedings. It appears that the debate over this last-mentioned report is continuing even between Australian scientists.

15. For the similar experiments of the French Government to be the subject of a dispute with which the Court can deal, it would at all events be necessary that what used to be lawful should have

become unlawful at a certain moment in the history of the development of **nuclear** weapons. What is needed to remove from the Applicant the disqualification arising out of its conduct is proof that this change has taken place : what Australia presented between 1963 and the end of 1972 as a conflict of interests, a clash of political views on the problems of the preparation, development, possession and utilization of atomic weapons, i.e., as a challenge to France's assertion of the right to the independent development of **nuclear** weapons, cannot have undergone a change of legal nature solely as a result of the alteration by a new government of the formal presentation of the contention previously advanced. It would have to be proved that between the pre-1963 and subsequent explosions the international community effected a passage from non-law to law.

16. The Court's examination of this point could have taken place as early as June 1973, because it amounts to no more than the preliminary investigation of problems entirely separate from the merits, whatever views one may hold on the sacrosanctity of the distinction between the different phases of the same proceedings (cf. para. 3 above). The point is that if the Treaty of 5 August 1963 Banning **Nuclear Tests** in the Atmosphere, in Outer Space and Under Water is not opposable to France, there is no dispute which Australia can submit to the Court, and dismissal would not require any consideration of the contents of the Treaty.

17. The multilateral form given to the Treaty of 5 August 1963 is of course only one of several elements where the legal analysis of the extent of its opposability to States not parties to it is concerned. One need only say that the preparation and drafting of the text, the unequal régime as between the parties for the ratification of amendments, and the system of supervision have enabled the Treaty to be classified as, constructively, a bi-polar statute, accepted by a large number of States but not binding on those remaining outside the Treaty. There is in fact no necessity to linger on the subject in view of the subsequent conduct of the States assuming the principal responsibility for the Treaty. None of the three **nuclear** Powers described as the "Original Parties" in Article II of the Treaty has ever informed the other **nuclear** Powers, not parties thereto, that this text imposed any obligation whatever upon them ; on the contrary, the three Original Parties, even today, call upon the Powers not parties to accede to the Treaty. The Soviet delegate to the Disarmament Conference declared at the opening of the session on 20 February **1974** that the negotiations for the termination of **nuclear tests** "required the participation of all **nuclear** States". On 21 October **1974** , in the First Committee of the General Assembly, the delegate of the United States said that one of the aims was to call for the co-operation of States which had not yet ratified the 1963 Treaty. Statements to the same effect have been made on behalf of the Government of the United Kingdom ; on 2 July 1973 the Minister of State for Foreign and Commonwealth Affairs stated during a parliamentary debate :

"As far back as 1960, however, the French and the Chinese declined to subscribe to any international agreement on **testing**. They are not bound, therefore, by the obligations of the **test** ban treaty of 1963 ...

In 1963 Her Majesty's Government, as well as the United States Government, urged the French Government to sign the partial **test** ban treaty.

As initiators and signatories of the treaty, we are seriously concerned at the continuation of **nuclear tests** in the atmosphere, and we urge that all Governments which have not yet done so should adhere to it. This view is well known to the French and Chinese Governments. It has been stated publicly by successive Governments." (*Hansard*, cols. 58 and 59.)

18. The conduct of the Original Parties which laid down the rules of the present **nuclear** statute by mutual agreement shows that those **nuclear** States which have refused to accede to this statute cannot be considered as subjected thereto by virtue of a doctrinal construction contrary to the formally expressed intentions of the sponsors and guardians of the Statute. The French Government, for its part, has always refused to recognize the existence of a rule opposable to it,

as many statements made by it show.

19. The Treaty which the United States and the Union of Soviet Socialist Republics signed in Moscow on 3 July **1974**, on the limitation of underground **nuclear testing** (United Nations, *General Assembly Official Records*, A/9698, 9 August **1974**, Ann. I) contains the following preambular paragraph :

“Recalling the determination expressed by the Parties to the 1963 Treaty Banning **Nuclear** Weapon **Tests** in the Atmosphere, in Outer Space and Under Water in its preamble to seek to achieve the discontinuance of all **test** explosions of **nuclear** weapons for all time, and to continue negotiations to this end.” (Cf. the second preambular paragraph of the 1963 Treaty.)

Like the 1963 Treaty, the Treaty of **1974** embodies the right of each party to withdraw from the treaty if extraordinary events jeopardize “its supreme interests”.

20. To determine whether a rule of international law applicable to France did or did not exist was surely an operation on the same level as the ascertainment of the non-existence of a justiciable dispute. To find that the Treaty of 1963 cannot be relied on against France requires merely the determination of a legal fact established by the text and by the consistent conduct of the authors of the legal statute in question. Similarly, to find that no custom has come into being which is opposable to those States which steadfastly declined to accept that statute, when moreover (as we have seen in the foregoing paragraphs) the existence of such customary rule is disproved by the positions adopted subsequent to the treaty supposed to give it expression, would merely be to verify the existence of a source of obligation.

By not proceeding, as a preliminary, to verification of the existence of any source of obligation opposable to the French Government, the Court refused to render justice to a State which, from the very outset, manifested its categorical opposition to proceedings which it declared to be without object and which it requested the Court to remove from the list ; an action which the Court was not to take until 20 months had elapsed.

21. The character of the quarrel between the Australian Government, and the French Government is that of a conflict of political interests concerning a question, **nuclear tests**, which is only one inseparable element in the whole range of the problems to which the existence of **nuclear** weapons gives rise and which at present can be approached and settled only by means of negotiations.

As the Court said in 1963, “it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved” (*Northern Cameroons*, **I.C.J. Reports** 1963, p. 37).

In the absence of any rule which can be opposed to the French Government for the purpose of obtaining from the Court a declaration prohibiting the French **tests** and those alone, the whole case must collapse. I shall therefore say nothing as to the other grounds on which the claim can be dismissed at the outset on account of the Applicant's want of standing, such as the inadmissibility either of an *actio popularis* or of an action *erga omnes* disguised as an action against a single State. The accumulation of fall-out is a world-wide problem ; it is not merely the last straw which breaks the camel's back (cf. the refusal of United States courts to admit the proceedings brought by Professor Linus Pauling and others who claimed that American **nuclear tests** in the Pacific should stop ¹).

* * *

22. I have still certain brief observations to make as to the conduct, from the very outset, of these proceedings before the Court, in relation to certain general principles of the regular functioning of

international adjudication, for the conduct of the proceedings gave rise to various problems, concerning Articles 53 and 54 of the Statute of the Court, whose existence will not be evident to the reader of the Judgment, given the adopted grounds of decision.

23. What happened, in sum, was that a misunderstanding arose when the questions of jurisdiction and admissibility were written into the Order of 22 June 1973 as the prescribed subject-matter of the phase which had been decided upon “to resolve [them] as soon as possible”; for the separate and dissenting opinions of June 1973 reveal on the one hand that, for certain Members of the Court, the problem of the existence of the object of the dispute should be settled in the new phase, whereas a majority of judges, on the other hand, had made up their minds to deal in that phase solely with the questions of the jurisdiction of the Court *stricto sensu*, and of the legal interest of the Applicant, and to join all other questions to the merits, including the question whether the proceedings had any object. At best, therefore, the jurisdiction/admissibility phase could only result in a decision on jurisdiction and the legal interest of the Applicant, and if that decision were positive, all the rest being joined to the merits, the real decision would have been deferred to an extremely remote phase. A settlement would therefore have been possible “sooner” if jurisdiction/admissibility and merits had not been separated. The reason for this refusal in 1973 to decide on the “preliminary” character of the question concerning the existence of a justiciable dispute is to be found in an interpretation of Article 53 consisting of the application to a default situation of Article 67 of the Rules of Court, governing preliminary objections in adversary proceedings, the analogy thus provoking a veritable breach of Article 53 of the Statute.

24. The misunderstanding on the scope of the phase decided on by the Order of 22 June 1973 was not without effect before the Court : the apparent contradiction between paragraph 23 and paragraph 35 of the Order enabled the Applicant to say to the Court, at the hearing of 6 July 1974, that the only question of admissibility was that of “legal interest”, subject to any indication to the contrary from the Court. That indication was given by the President on 9 July : “The Court will of course appreciate the question of admissibility in all the aspects which it considers relevant.”

This process of covert and contradictory allusions, in which the conflicts of views expressed in the opinions sometimes reappear, is not without its dangers. This is evident both as regards this Order of 22 June 1973 and as regards the attempts to make use of paragraphs 33 and 34 of the Judgment in the *Barcelona Traction* case without taking account of the existence of paragraphs inconsistent with these, i.e., paragraphs 89 to 91, which were in fact intended to qualify and limit the scope of the earlier pronouncement. That pronouncement was in fact not directly related to the subject of the judgment, and was inserted as a sort of bench-mark for subsequent use ; but all bench-marks must be observed.

25. Article 53 of the Statute has had the Court's attention from the outset of the proceedings, i.e., ever since the receipt on 16 May 1973 of a letter from the French Government declaring its intention not to appear and setting forth its reasons ; but, in my view, it has been wrongly applied. A further general examination of the interpretation of the rule embodied in Article 53 is required.

To speak of two parties in proceedings in which one has failed to appear, and has on every occasion re-affirmed that it will not have anything to do with the proceedings is to refuse to look facts in the face. The fact is that when voluntary absence is asserted and openly acknowledged there is no longer more than one party in the proceedings. There is no justification for the fiction that, so long as the Court has not recognized its lack of jurisdiction, a State which is absent is nevertheless a party in the proceedings. The truth of the matter is that, in a case of default, three distinct interests are affected : that of the Court, that of the applicant and that of the respondent; the system of wholly ignoring the respondent's decision not to appear and of depriving it of effect is neither just nor reasonable. In the present case, by its reasoned refusal to appear the Respondent has declared that, so far as it is concerned, there are no proceedings, and this it has repeated each time the Court has consulted it. Even if the Court refrains for a time from recording that

default, the fact remains that the Respondent has performed an act of default from which certain legal consequences flow. Moreover, the applicant is entitled under Article 53 to request immediately that judicial note be taken thereof and the consequences deduced. That is what the Applicant did, in the present instance, when it said in 1973 that the Court was under an obligation to apply its rules of procedure, without indicating which, and to refuse to take account of views and documents alleged by the Applicant to have been irregularly presented by the Respondent. And the Court partially accepted this point of view, in not effecting all communications to the Respondent which were possible.

The result of not taking account of the Respondent's default has been the granting of time-limits for pleadings which it was known would not be forthcoming, in order to maintain theoretical equality between the parties, whereas in fact the party which appeared was favoured. There was nothing to prevent the Court from fixing a short time-limit for the presumptive Respondent—one month, for example—the theoretical possibility being left open of a statement by the State in default during that time, to the effect that it had changed its mind and requested a normal time-limit for the production of a Memorial.

26. When it came to receiving or calling in the Agent of the Applicant in the course of the proceedings in 1973, there was a veritable breach of the equality of the Parties in so far as some of these actions or approaches made by the Applicant were unknown to the presumptive Respondent. (On this point, cf. paras. 31 and 33 below.)

On this question of time-limits the Court has doubtless strayed into paths already traced, but precedents should not be confused with mandatory rules ; each case has its own particular features and it is mere mechanical justice which contents itself with reproducing the decisions of previous proceedings. In the present case the Court was never, as in the *Fisheries Jurisdiction* cases, informed of negotiations between the Parties after the filing of the Application, and the double time-limits accorded did not even have the justification, which they might have had in the abovementioned cases, of enabling progress to be made in such negotiations ; and there was never the slightest doubt, from the outset, on the question of the existence of a genuine legal dispute.

27. It is not my impression that the authors of Article 53 of the Statute intended it to be interpreted as if it had no effect of its own. It is not its purpose to enable proceedings to be continued at leisure without regard to the positions adopted by the absent respondent ; it is true that the applicant is entitled to see the proceedings continue, but not simply as it wishes, with the Court reliant on unilateral indications of fact and law ; the text of Article 53 was designed to avoid such an imbalance in favour of the applicant. When the latter calls upon the Court to decide in favour of its claim, which the present Applicant did not do explicitly on the basis of Article 53 but which resulted from its observations and submissions both in June 1973, at the time of the request for interim measures of protection, and in the phase which the Judgment brings to a close today, it would be formalistic to maintain that the absence of any explicit reference to Article 53 changes the situation. It must needs be realized that the examination of fact and law provided for in Article 53 has never begun, since the Court held in 1973 that the consequences of the nonappearance could be joined to the questions of jurisdiction and admissibility, and that, in the end, the question of the effects of non-appearance will not have been dealt with. Thus this case has come and gone as if Article 53 had no individual significance.

28. If we return to the sources, we note that the rapporteur of the Advisory Committee of Jurists (PV, p. 590) stated that the Committee had been guided by the examples of English and American jurisprudence in drafting what was then Article 52 of the Statute on default. Lord Phillimore, a member of the Committee, had had inserted the sentence which in large measure has survived : “The Court must, before [deciding in favour of the claim], satisfy itself that the claim is supported by conclusive evidence and well founded in fact and law.” The words which disappeared in the

course of the consideration of the text by the Assembly of the League of Nations were regarded as unnecessary and as merely overlapping the effect of the formula retained. The matter was clarified in only one respect by the Court's 1922 discussion, on account of the personality of the judges who expressed their views on a draft article proposed for the Rules of Court by Judge Anzilotti :

“If the response to an application is confined to an objection to the jurisdiction of the Court, or if the State affected fails to reply within the period fixed by the Court, the latter shall give a special decision on the question of jurisdiction before proceeding further with the case.”
(*P.C.I.J., Series D, No. 2, p. 522.*)

Judge Huber supported the text. Lord Finlay did not feel that the article was necessary, because,

“... even if there was no rule on the subject, the Court would always consider the question of its jurisdiction before proceeding further with the case. It would have to be decided in each particular case whether the judgment with regard to the jurisdiction should be delivered separately or should be included in the final judgment” (*ibid.*, p. 214).

Judge Anzilotti's text was rejected by 7 votes to 5. The general impression given by the influence English jurisprudence was recognized to possess, and by the observations first of Lord Phillimore and then of Lord Finlay, is that the Court intended to apply Article 53 in a spirit of conscientious verification of all the points submitted by the applicant when the respondent was absent from the proceedings, and that it would have regard to the circumstances of each case. As is well known, in the British system important precautions are taken at a wholly preliminary stage of a case to make sure that the application stands upon a genuinely legal claim, and the task of ascertaining whether this is so is sometimes entrusted to judges other than those who would adjudicate (cf. Sir Gerald Fitzmaurice's opinion in the *Northern Cameroons* case (*I.C.J. Reports 1963*, pp. 106 f.), regarding “filter” procedures whereby, as “part of the inherent powers or jurisdiction of the Court as an international tribunal”, cases warranting removal can be eliminated at a preliminary stage).

Between this interpretation and that which the Court has given of Article 53 in the present case, there is all the difference that lies between a pragmatic concern to hold a genuine balance between the rights of two States and a procedural formalism that treats the absent State as if it were a party in adversary proceedings, which it is not, by definition.

* * *

29. On 22 June 1973, before the Court's decision had been read at a public sitting, a public statement which had been made by the Prime Minister of Australia on 21 June at Melbourne, and which had been widely reported by the Australian press ¹, reached Europe; in it the Prime Minister stated that the Court had acceded by 8 votes to 6 to Australia's request.

30. It must first be explained that, whether by inadvertence or for some other reason, the Court was not aware of that disclosure until after its decision had been read out at the public sitting of 22 June ; it can be imagined that the Court would otherwise have postponed the reading of the Order on 22 June. As the aftermath of this incident has only been dealt with in two communiqués, one issued on 8 August 1973 and the other on 26 March 1974, it would be difficult to describe it if the Court had not finally decided on 13 December 1974 that certain documents would be published in the volume of *Pleadings, Oral Arguments, Documents* to be devoted to this case ². Taking into account certain press items and these public documents or communiqués, I find it necessary to explain why I voted on 21 March 1974 against the Court's decision, by 11 votes to 3, to close its investigations on the scope and origins of the public disclosure by the Prime Minister of Australia of the decision of 22 June 1973. The Court's vote was on a resolution reproduced in the press communiqué of 26 March 1974 .

It is to be hoped that no-one will dispute the view that, if the head of government of a State party to

a case discloses a decision of the Court before it is made public, there has been a breach of the prescriptions of Article 54, paragraph 3, of the Statute: "The deliberations of the Court shall take place in private and remain secret." At the moment of the disclosure, on 21 June, the decision was as yet no more than a text which had been deliberated and adopted by the Court and was covered by the rule of secrecy embodied in Article 54. In a letter of 27 June 1973¹, the Prime Minister of Australia referred to the explanations furnished on that same date by a letter from the Co-Agent of Australia 1 and expressed his regret "at any embarrassment which the Court may have suffered as a result of my remarks". According to the Co-Agent, the Prime Minister's statement of 21 June had been no more than a speculative comment, inasmuch as a view had been current among Australian advisers to the effect that the decision could be in Australia's favour, but by a small majority, while press comment preceding the Prime Minister's remarks had speculated in some instances that Australia would win by a narrow margin.

31. But whatever endeavours may have been made to explain the Prime Minister's statement, whether at the time or, subsequently, by the Agent and Co-Agent of Australia on various occasions, the facts speak for themselves. The enquiry opened at the request of certain Members of the Court on the very afternoon of 22 June 1973 was closed nine months later without the Court's having given any precise indication, in its resolution of 21 March **1974**, as to the conclusions that might have been reached in consequence. The only elements so far published, or communicated to the Government which was constantly regarded by the Court as the Respondent and had therefore the right to be fully informed, which was by no means the case, are : the Australian Prime Minister's letter of 27 June 1973 and the Co-Agent's letter of the same date ² ; the text of a statement made by the Attorney-General of Australia on 21–22 June 1973 ² ; the communiqué of 8 August 1973 ; the reply by the Prime Minister to a question put in the Australian House of Representatives on the circumstances in which he had been apprised of the details of the Court's decision (Australian *Hansard*, 12 September 1973) ; a resolution by which the Court on 24 January **1974** decided to interrogate the Agent of Australia ² (the minutes of these conversations were not communicated to the Respondent and will not be published) ; the communiqué of 26 March **1974** ³.

I found it contrary to the interests of the Court, in the case of so grave an incident, one which lays its 1973 deliberation open to suspicion, to leave that suspicion intact and not to do what is necessary to remove it. I will merely observe that the crystal-gazing explanation relied on by the Prime Minister and the Agent's statements enlarging thereon, with the attribution of an oracular role to the Australian advisers, brought the Court no positive enlightenment in its enquiry and should be left to the sole responsibility of their authors.

32. Were it maintained that a that of government did not have to justify to the Court any statements made out of court and that moreover, even if his statement was regrettable, the harm was done and could not affect the case before the Court, L would find these propositions incorrect. The statement in question concerned a decision of the Court and could lead to a belief that persons privy to its deliberations had violated their obligation to keep it secret, with all the consequences that supposition would have entailed if confirmed.

33. In concluding on 21 March **1974** that it could not pursue the matter further, and in making this publicly known, the Court stigmatized the incident and indirectly signified that it could not accept the excuse that its decisions had been divined, but it recognized that, according to its own assessment, it was not possible to uncover anything further as to the origins of the disclosure.

I voted against this declaration and the closure of the enquiry because I consider that the investigation should have been pursued, that the initial results were not inconsequential and could be used as a basis for further enquiry, especially when not all the means of investigation available to the Court had been made use of (Statute, Arts. 48, 49 and 50). Such was not the opinion of the Court, which decided to treat its investigations as belonging to an internal enquiry. My understanding, on the contrary, was that the incident of the disclosure was an element in the

proceedings before the Court—which is why the absent Respondent was kept partly informed by the Court, in particular by a letter of 31 January 1974—and that the Court was fully competent to resolve such an incident by judicial means, using any procedure it might decide to set up (cf. the Court's decision on “the competence required to enable [the] functions [of the United Nations] to be effectively discharged” (*I.C.J. Reports 1949*, p. 179)). How could one suppose *a priori* that pursuit of the enquiry would have been ineffectual without having attempted to organize such an enquiry? Even if circumstances suggested that refusals to explain or evasions could be expected, to note those refusals or evasions would not have been ineffectual and would have been a form of censure in itself.

34. Symptomatic of the hesitation to get to the bottom of the incident was the time taken to begin looking into the disclosure : six weeks, from 22 June to 8 August 1973, were to elapse before the issue of the mildest of communiqués, palliative in effect and not representing the unanimous views of the Court. For more than six months, all that was produced was a single paper embodying a documented analysis of the successive press disclosures on the progress of the proceedings before the Court up to the dramatic public disclosure of the result and of the Court's vote by the Prime Minister on 21 June in Melbourne ¹. This analysis of facts publicly known demonstrates how the case was accompanied by a succession of rumours whose disseminators are known but whose source is not unmasked. On 21 March 1974 the investigation was stopped, and the various paths of enquiry and deduction opened up by this analysis as also by the second report will not be pursued.

I consider that the indications and admissions that had already come to light opened the path of enquiry instead of closing it. A succession of mistakes, forgettings, tolerations, failures to react against uncalled-for overtures or actions, each one of which taken in isolation could have been considered devoid of particular significance, but which assume such significance by their accumulation and impunity ; unwise conversations at improper moments, of which no minutes exist : all this combines to create a sense of vagueness and embarrassment, as if a refusal to acknowledge and seek to unravel the facts could efface their reality, as if a saddened silence were the only remedy and the sole solution.

35. The harm was done, and has been noted (report of the Court to the United Nations 1973–1974, para. 23 ; debate in the Sixth Committee of the General Assembly, 1 October 1974, A/C.6/SR.1466, p. 6 ; parliamentary answers by the French Minister for Foreign Affairs on 26 January 1974, *Journal Officiel* No. 7980, and 20 July 1974, *Journal Officiel* No. 11260). Even if it is not, at the present moment, possible to discover more concerning the origin and development of the process of disclosure, as the Court has stated in its resolution of 21 March 1974, I remain convinced that a judicially conducted enquiry could have elucidated the channels followed by the multiple disclosures noted in this case, the continuity and accuracy of which suggest that the truth of the matter was not beyond the Court's reach. Such is the meaning of my refusal of the resolution of 21 March 1974 terminating an investigation which was begun with reluctance, conducted without persistence and concluded without reason.

* * *

36. Among the lessons to be learned from this case, in which a conflict of political interests has been clothed in the form of a legal dispute, I would point to one which I feel to merit special attention. Before these proceedings were instituted, the General Act, ever since 1939, had been dwelling in a kind of chiaroscuro, formally in force if one took account only of express denunciation, but somewhat dormant :

“So far as the General Act is concerned, there prevails, if truth be told, a climate of indifference or obliviousness which casts some doubt on its continuance in force, at least where the Act of 1928 is concerned.” (H. Rolin, *L'arbitrage obligatoire : une panacée illusoire*, 1959, p. 259.)

After the General Act had, with great elaboration, been presented to the Court as a wide-open basis of possible jurisdiction, the behaviour of the States formally considered as parties thereto is noteworthy. The French Government was the first to denounce the General Act, on 2 January 1974, then on 6 February 1974 the Government of the United Kingdom did likewise. The Government of India, since June 1973, has informed the Court and the United Nations of its opinion as to the General Act's having lapsed (see also the new declaration by which India, on 15 September 1974, accepted the jurisdiction of the Court under Article 36, paragraph 2, of the Statute). Thus we see that States with substantial experience of international adjudication and arbitration have only to note that there is some possibility of the General Act's being actually applied, instead of declarations less unreservedly accepting the jurisdiction of the Court, to announce either (in two cases) that they are officially putting an end to it or (in the other) that they consider it to have lapsed. The cause of international adjudication has not been furthered by an attempt to impose the Court's jurisdiction, apparently for a formal reason, on States in whose eyes the General Act was, quite clearly, no longer a true yardstick of their acceptance of international jurisdiction.

Mr. Charles De Visscher had already shown that courts should take care not to substitute doctrinal and systematized views for the indispensable examination of the intentions of States. This is how he defined the obligation upon the international judge to exercise reserve :

“The man of law, naturally enough, tends to misunderstand the nature both of political tensions and of the conflicts they engender. He is inclined to see in them only ‘the object of a dispute’, to enclose within the terms of legal dialectic something which is pre-eminently refractory to reasoning, to reduce to order something wholly consisting of unbridled dynamism, in a word, to try to depoliticize something which is political of its essence. Here it is not merely a question, as is all too often repeated, of a deficiency in the mechanism of law-transformation, or of gaps in the legal regulation of things. We are dealing with a sphere into which, *a priori*, it is only exceptionally that law penetrates. Law can only intervene in the presence of elements it can assimilate, i.e., facts or imperatives possessing a regularity and at least minimum correspondence with a given social order that enable them to be subjected to reasoned analysis, classified within some known category, and reduced to an objective value-judgment capable of serving in its turn as a basis for the application of established norms.” (*Théories et réalités en droit international public*, 1970, p. 96.)

There is a certain tendency to submit essentially political conflicts to adjudication in the attempt to open a little door to judicial legislation and, if this tendency were to persist, it would result in the institution, on the international plane, of government by judges ; such a notion is so opposed to the realities of the present international community that it would undermine the very foundations of jurisdiction.

(Signed) A. Gros.

Separate Opinion of Judge Petrán

Judge Petrán

[Translation]

1 If I have been able to vote for the Judgment, it is because its operative paragraph finds that the claim is without object and that the Court is not called upon to give a decision thereon. As my examination of the case has led me to the same conclusion, but on grounds which do not coincide with the reasoning of the Judgment, I append this separate opinion.

2 The case which the Judgment brings to an end has not advanced beyond the preliminary stage

in which the questions of the jurisdiction of the Court and the admissibility of the Application fall to be resolved. Australia's request for the indication of interim measures of protection could not have had the consequence of suspending the Court's obligation to consider the preliminary questions of jurisdiction and admissibility as soon as possible. On the contrary, that request having been granted, it was particularly urgent that the Court should decide whether it had been validly seised of the case. Any delay in that respect meant the prolongation, embarrassing to the Court and to the Parties, of uncertainty concerning the fulfilment of an absolute condition for the justification of any indication of interim measures of protection.

3 In this situation, it was highly imperative that the provisions of the Rules of Court which were revised not so long ago for the purpose of accelerating proceedings should be strictly applied. Only recently, moreover, on 22 November 1974, the General Assembly of the United Nations adopted, on the item concerning a review of the Court's role, resolution 3232 (XXIX), of which one preambular paragraph recalls how the Court has amended its Rules in order to facilitate recourse to it for the judicial settlement of disputes, *inter alia*, by reducing the likelihood of delays. Among the reasons put forward by the Court itself to justify revision of the Rules, there was the necessity of adapting its procedure to the pace of world events (*I.C.J. Yearbook 1967–1968*, p. 87). Now if ever, in this atomic age, there was a case which demanded to be settled in accordance with the pace of world events, it is this one. The Court nevertheless, in its Order of 22 June 1973¹ indicating interim measures of protection, deferred the continuance of its examination of the questions of jurisdiction and admissibility, concerning which it held, in one of the *consideranda* to the Order, that it was necessary to resolve them *as soon as possible*.

4 Despite the firmness of this finding, made in June 1973, it is very nearly 1975 and the preliminary questions referred to have remained unresolved. Having voted against the Order of 22 June 1973 because I considered that the questions of jurisdiction and admissibility could and should have been resolved without postponement to a later session, I have a *fortiori* been opposed to the delays which have characterized the continuance of the proceedings and the upshot of which is that the Court has concluded that Australia's Application is without object *now*. I must here recall the circumstances in which certain time-limits were fixed, because it is in the light of those circumstances that I have had to take up my position on the suggestion that consideration of the admissibility of the Application should be deferred until some later date.

5 When, in the Order of 22 June 1973, the Court invited the Parties to produce written pleadings on the questions of its jurisdiction and the admissibility of the Application, it fixed 21 September 1973 as the time-limit for the filing of the Australian Government's Memorial and 21 December 1973 as the time-limit for the filing of a Counter-Memorial by the French Government. This decision was preceded by a conversation between the Acting President and the Agent of Australia, who stated that he could agree to a three-month time-limit for his own Government's pleading. No contact was sought with the French Government at that same time. No reference is to be found in the Order to the application of Article 40 of the Rules of Court or, consequently, to the consultation which had taken place with the Agent of Australia. After the Order had been made, the Co-Agent of Australia, on 25 June 1973, informed the Acting President that his Government felt it would require something in the nature of a three-month extension of time-limit on account of a new element which was bound to have important consequences, namely that the Memorial would now have to deal not only with jurisdiction but also with admissibility. Although the Court remained in session until 13 July 1973, this information was not conveyed to it. On 10 August 1973 the Co-Agent was received by the President and formally requested on behalf of his Government that the time-limit be extended to 21 December 1973, on the ground that questions of admissibility had not been foreseen when the Agent had originally been asked to indicate how much time he would require for the presentation of a Memorial on jurisdiction. Following this conversation the Co-Agent, by a letter of 13 August, requested that the time-limit should be extended to 23 November. Contrary to what had been done in June with regard to the fixing of the original time-limits, the French Government was invited to make known its opinion. Its reply was that, having denied the Court's jurisdiction in the case, it was

unable to express any opinion. After he had consulted his colleagues by correspondence on the subject of the time-limits and a majority had expressed a favourable view, the President, by an Order of 28 August, extended the time-limit for the filing of the Australian Government's Memorial to 23 November 1973 and the time-limit for the filing of a Counter-Memorial by the French Government to 19 April **1974**.

6 The circumstances in which the written proceedings on the preliminary questions were thus prolonged until 19 April **1974** warrant several observations. In the first place, it would have been more in conformity with the Statute and the Rules of Court not to have consulted the Australian Government until *after* the Order of 22 June 1973 had been made and to proceed at the same time to consult the French Government. Let us suppose that this new procedure were to be put into general practice and it became normal, before the Court's decision on a preliminary phase, to consult the Agents of the Parties regarding the time-limits for the next phase : any Agent who happened not to be consulted on a particular occasion would not require supernatural perspicacity to realize that this case was not going to continue.

7 To return to the present case, there is every reason to think that the French Government, if it had been consulted immediately after the making of the Order of 22 June 1973, would have given the same reply as it did two months later. It would then have been clear at once that the French Government had no intention of participating in the written proceedings and that there would be no necessity to allocate it a three-month period for the production of a Counter-Memorial. In that way the case could have been ready for hearing by the end of the summer of 1973, which would have enabled the Court to give its judgment before that year was out. After having deprived itself of the possibility of holding the oral proceedings during the autumn of 1973, the Court found itself faced with a request for the extension of the time-limit for the filing of the Memorial. It is to be regretted that this request, announced three days after the reading of the Order of 22 June 1973, was not drawn to the Court's attention while it was yet sitting, which would have enabled it to hold a regular deliberation on the question of extension. As it happened, the Order of 28 August not only extended the time-limit fixed for the filing of the Memorial of the Australian Government but also accompanied this time-limit with a complementary time-limit of five months for the filing of a Counter-Memorial which the French Government had no intention of presenting. Those five months merely prolonged the period during which the Australian Government was able to prepare for the oral proceedings, which was another unjustified favour accorded to that Government.

8 But that is not all : the Order of 28 August 1973 also had the result of reversing the order in which the present case and the *Fisheries Jurisdiction* cases should have become ready for hearing. In the latter cases, the Court, after having indicated interim measures of protection by Orders of 17 August 1972, had found, by its Judgments of 2 February 1973, that it possessed jurisdiction and, by Orders of 15 February 1973, had fixed the time-limits for the filing of Memorials and Counter-Memorials at 1 August 1973 and 15 January **1974** respectively. If the Order of 28 August 1973 extending the time-limits in the present case had not intervened, this case would have been ready for hearing on 22 December 1973, i.e., before the *Fisheries Jurisdiction* cases, and would have had priority over them by virtue of Article 50, paragraph 1, of the 1972 Rules of Court and Article 46, paragraph 1, of the 1946 Rules of Court which were still applicable to the *Fisheries Jurisdiction* cases. After the Order of 28 August 1973 had prolonged the written proceedings in the present case until 19 April **1974**, it was the *Fisheries Jurisdiction* cases which became entitled to priority on the basis of the above-mentioned provisions of the Rules of Court in either of their versions. However, the Court could have decided to restore the previous order of priority, a decision which Article 50, paragraph 2, of the 1972 Rules, and Article 46, paragraph 2, of the 1946 Rules, enabled it to take in special circumstances. The unnecessary character of the time-limit fixed for the filing of a Counter-Memorial by the French Government was in itself a special circumstance, but there were others even more weighty. In the *Fisheries Jurisdiction* cases, there was no longer any uncertainty concerning the justification for the indication of interim measures of protection, inasmuch as the Court had found that it possessed jurisdiction, whereas in the present

case this uncertainty had persisted for many months. Yet France had requested the removal of the case from the list and, supposing that attitude were justified, had an interest in seeing the proceedings brought to an end and, with them, the numerous criticisms levelled at it for not applying interim measures presumed to have been indicated by a Court possessing jurisdiction. Moreover, as France might during the summer of **1974** be carrying out a new series of atmospheric **nuclear tests**, Australia possessed its own interest in having the Court's jurisdiction confirmed before then, inasmuch as that would have conferred greater authority on the indication of interim measures.

9 For all those reasons, the Court could have been expected to decide to take the present case before the *Fisheries Jurisdiction* cases. Nevertheless, on 12 March **1974**, a proposal in that sense was rejected by 6 votes to 2, with 6 abstentions. In that way the Court deprived itself of the possibility of delivering a judgment in the present case before the end of the critical period of **1974**.

10 The proceedings having been drawn out until the end of **1974** by this series of delays, the Court has now found that Australia's Application is without object and that it is therefore not called upon to give a decision thereon.

11 It is not possible to take up any position vis-à-vis this Judgment without being clear as to what it signifies in relation to the preliminary questions which, under the terms of the Order of 22 June 1973, were to be considered by the Court in the present phase of the proceedings, namely the jurisdiction of the Court to entertain the dispute and the admissibility of the Application. As the Court has had frequent occasion to state, these are questions between which it is not easy to distinguish. The admissibility of the Application may even be regarded as a precondition of the Court's jurisdiction. In Article 8 of Resolution concerning the Internal Judicial Practice of the Court, competence and admissibility are placed side by side as conditions to be satisfied before the Court may undertake the consideration of the merits. It is on that basis that the Order of 22 June 1973 was drawn up. It emerges from its consideranda that the aspects of competence which are to be examined include, on the one hand, the effects of the reservation concerning activities connected with national defence which France inserted when it renewed in 1966 its acceptance of the Court's jurisdiction and, on the other hand, the relations subsisting between France and Australia by virtue of the General Act of 1928 for the Pacific Settlement of International Disputes, supposing that instrument to be still in force. However, the Order is not so precise regarding the aspects of the question of the admissibility of the Application which are to be explored. On the contrary, it specifies none, and it is therefore by a wholly general enquiry that the Court has to determine whether it was validly seised of the case. One of the very first prerequisites is that the dispute should concern a matter governed by international law. If this were not the case, the dispute would have no object falling within the domain of the Court's jurisdiction, inasmuch as the Court is only competent to deal with disputes in international law.

12 The Judgment alludes in paragraph 24 to the jurisdiction of the Court as viewed therein, i.e., as limited to problems related to the jurisdictional provisions of the Statute of the Court and of the General Act of 1928. In the words of the first sentence of that paragraph, "the Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings". In other words, the Judgment, which makes no further reference to the question of jurisdiction, indicates that the Court did not find that there was any necessity to consider or resolve it. Neither—though this it does not make so plain—does it deal with the question of admissibility.

13 For my part, I do not believe that it is possible thus to set aside consideration of all the preliminary questions indicated in the Order of 22 June 1973. More particularly, the Court ought in my view to have formed an opinion from the outset as to the true character of the dispute which

was the subject of the Application ; if the Court had found that the dispute did not concern a point of international law, it was for that absolutely primordial reason that it should have removed the case from its list, and not because the non-existence of the subject of the dispute was ascertained after many months of proceedings.

14 It is from that angle that I believe I should consider the question of the admissibility of Australia's Application. It is still my view that, as I said in the dissenting opinion which I appended to the Order of 22 June 1973, what is first and foremost necessary is to ask oneself whether atmospheric **tests** of **nuclear** weapons are, generally speaking, governed by norms of international law, or whether they belong to a highly political domain where the international norms of legality or illegality are still at the gestation stage. It is quite true that disputes concerning the interpretation or application of rules of international law may possess great political importance without thereby losing their inherent character of being legal disputes. It is nonetheless necessary to distinguish between disputes revolving on norms of international law and tensions between States caused by measures taken in a domain not yet governed by international law.

15 In that connection, I feel it may be useful to recall what has happened in the domain of human rights. In the relatively recent past, it was generally considered that the treatment given by a State to its own subjects did not come within the purview of international law. Even the most outrageous violations of human rights committed by a State towards its own nationals could not have formed the subject of an application by another State to an international judicial organ. Any such application would have been declared inadmissible and could not have given rise to any consideration of the truth of the facts alleged by the applicant State. Such would have been the situation even in relations between States having accepted without reservation the optional clause of Article 36 of the Statute of the Permanent Court of International Justice. The mere discovery that the case concerned a matter not governed by international law would have been sufficient to prevent the Permanent Court from adjudicating upon the claim. To use the terminology of the present proceedings, that would have been a question concerning the admissibility of the application and not the jurisdiction of the Court. It is only an evolution subsequent to the Second World War which has made the duty of States to respect the human rights of all, including their own nationals, an obligation under international law towards all States members of the international community. The Court alluded to this in its Judgment in the case concerning the *Barcelona Traction, Light and Power Company, Limited (I.C.J. Reports 1970, p. 32)*. It is certainly to be regretted that this universal recognition of human rights should not, up to now, have been accompanied by a corresponding evolution in the jurisdiction of international judicial organs. For want of a watertight system of appropriate jurisdictional clauses, too many international disputes involving the protection of human rights cannot be brought to international adjudication. This the Court also recalled in the abovementioned Judgment (*ibid.*, p. 47), thus somewhat reducing the impact of its reference to human rights and thereby leaving the impression of a self-contradiction which has not escaped the attention of writers.

16 We can see a similar evolution taking place today in an allied field, that of the protection of the environment. Atmospheric **nuclear tests**, envisaged as the bearers of a particularly serious risk of environmental pollution, are a source of acute anxiety for present-day mankind, and it is only natural that efforts should be made on the international plane to erect legal barriers against that kind of **test**. In the present case, the question is whether such barriers existed at the time of the filing of the Australian Application. That Application cannot be considered admissible if, at the moment when it was filed, international law had not reached the stage of applicability to the atmospheric **testing** of **nuclear** weapons. It has been argued that it is sufficient for two parties to be in dispute over a right for an application from one of them on that subject to be admissible. Such would be the situation in the present case, but to my mind the question of the admissibility of an application cannot be reduced to the observance of so simple a formula. It is still necessary that the right claimed by the applicant party should belong to a domain governed by international law. In the present case, the Application is based upon an allegation that France's **nuclear tests** in the

Pacific have given rise to radio-active fall-out on the territory of Australia. The Australian Government considers that its sovereignty has thereby been infringed in a manner contrary to international law. As there is no treaty link between Australia and France in the matter of **nuclear tests**, the Application presupposes the existence of a rule of customary international law whereby States are prohibited from causing, through atmospheric **nuclear tests**, the deposit of radio-active fall-out on the territory of other States. It is therefore the existence or non-existence of such a customary rule which has to be determined.

17 It was suggested in the course of the proceedings that the question of the admissibility of the Application was not of an exclusively preliminary character and that consideration of it could be deferred until the examination of the merits. This raises a question regarding the application of Article 67 of the 1972 Rules of Court. The main motive for the revision of the provisions of the Rules which are now to be found in that Article was to avoid the situation in which the Court, having reserved its position with regard to a preliminary question, orders lengthy proceedings on the substantive aspects of a case only to find at the end that the answer to that preliminary question has rendered such proceedings superfluous. It is true that Article 67 refers only to preliminary objections put forward by the respondent, but it is obvious that the spirit of that Article ought also to apply to the consideration of any questions touching the admissibility of an application which the Court is to resolve *ex officio*. It is also plainly incumbent upon the Court, under Article 53 of the Statute, to take special care to see that the provisions of Article 67 of the Rules are observed when the respondent is absent from the proceedings.

18 In sum, the Court, for the first time, has had occasion to apply the provision of its revised Rules which replaced the former provisions enabling preliminary objections to be joined to the merits. One may ask where the real difference between the new rule and the old lies. For my part, I consider that the new rule, like the old, bestows upon the Court a discretionary power to decide whether, in the initial stage of a case, such and such a preliminary question ought to be settled before anything else. In exercising this discretionary power the Court ought, in my view, to assess the degree of complexity of the preliminary question in relation to the whole of the questions going to the merits. If the preliminary question is relatively simple, whereas consideration of the merits would give rise to lengthy and complicated proceedings, the Court should settle the preliminary question at once. That is what the spirit in which the new Article 67 of the Rules was drafted requires. These considerations appear to me to be applicable to the present case.

19 The Court would have done itself the greatest harm if, without resolving the question of admissibility, it had ordered the commencement of proceedings on the merits in all their aspects, proceedings which would necessarily have been lengthy and complicated if only because of the scientific and medical problems involved. It should be recalled that, in the preliminary stage from which they have not emerged, the proceedings had already been subjected to considerable delays, which left the Australian Government ample time to prepare its written pleadings and oral arguments on all aspects of admissibility. How, in those circumstances, could the consideration of the question have been postponed to some later date?

20 As is clear from the foregoing, the admissibility of the Application depends, in my view, on the existence of a rule of customary international law which prohibits States from carrying out atmospheric **tests** of **nuclear** weapons giving rise to radio-active fall-out on the territory of other States. Now it is common knowledge, and is admitted by the Australian Government itself, that any **nuclear** explosion in the atmosphere gives rise to radio-active fall-out over the whole of the hemisphere where it takes place. Australia, therefore, is only one of many States on whose territory France's atmospheric **nuclear tests**, and likewise those of other States, have given rise to the deposit of radio-active fall-out. Since the Second World War, certain States have conducted atmospheric **nuclear tests** for the purpose of enabling them to pass from the atomic to the thermonuclear stage in the field of armaments. The conduct of these States proves that their Governments have not been of the opinion that customary international law forbade atmospheric

nuclear tests. What is more, the Treaty of 1963 whereby the first three States to have acquired **nuclear** weapons mutually banned themselves from carrying out further atmospheric **tests** can be denounced. By the provision in that sense the signatories of the Treaty showed that they were still of the opinion that customary international law did not prohibit atmospheric **nuclear tests**.

21 To ascertain whether a customary rule to that effect might have come into being, it would appear more important to learn what attitude is taken up by States which have not yet carried out the **tests** necessary for reaching the **nuclear** stage. For such States the prohibition of atmospheric **nuclear tests** could signify the division of the international community into two groups: States possessing **nuclear** weapons and States not possessing them. If a State which does not possess **nuclear** arms refrains from carrying out the atmospheric **tests** which would enable it to acquire them and if that abstention is motivated not by political or economic considerations but by a conviction that such **tests** are prohibited by customary international law, the attitude of that State would constitute an element in the formation of such a custom. But where can one find proof that a sufficient number of States, economically and technically capable of manufacturing **nuclear** weapons, refrain from carrying out atmospheric **nuclear tests** because they consider that customary international law forbids them to do so? The example recently given by China when it exploded a very powerful bomb in the atmosphere is sufficient to demolish the contention that there exists at present a rule of customary international law prohibiting atmospheric **nuclear tests**. It would be unrealistic to close one's eyes to the attitude, in that respect, of the State with the largest population in the world.

22 To complete this brief outline, one may ask what has been the attitude of the numerous States on whose territory radio-active fall-out from the atmospheric **tests** of the **nuclear** Powers has been deposited and continues to be deposited. Have they, generally speaking, protested to these Powers, pointing out that their **tests** were in breach of customary international law? I do not observe that such has been the case. The resolutions passed in the General Assembly of the United Nations cannot be regarded as equivalent to legal protests made by one State to another and concerning concrete instances. They indicate the existence of a strong current of opinion in favour of proscribing atmospheric **nuclear tests**. That is a political task of the highest urgency, but it is one which remains to be accomplished. Thus the claim submitted to the Court by Australia belongs to the political domain and is situated outside the framework of international law as it exists today.

23 I consider, consequently, that the Application of Australia was, from the very institution of proceedings, devoid of any object on which the Court could give a decision, whereas the Judgment finds only that such an object is lacking now. I concur with the Judgment so far as the outcome to be given the proceedings is concerned, i.e., that the Court is not called upon to give a decision, but that does not enable me to associate myself with the grounds on which the Judgment is based. The fact that I have nevertheless voted for it is explained by the following considerations.

24 The method whereby the judgments of the Court are traditionally drafted implies that a judge can vote for a judgment if he is in agreement with the essential content of the operative part, and that he can do so even if he does not accept the grounds advanced, a fact which he normally makes known by a separate opinion. It is true that this method of ordering the matter is open to criticism, more particularly because it does not rule out the adoption of judgments whose reasoning is not accepted by the majority of the judges voting in favour of them, but such is the practice of the Court. According to this practice, the reasoning, which represents the fruit of the first and second readings in which all the judges participate, precedes the operative part and can no longer be changed at the moment when the vote is taken at the end of the second reading. This vote concerns solely the operative part and is not followed by the indication of the reasons upheld by each judge. In such circumstances, a judge who disapproves of the reasoning of the judgment but is in favour of the outcome achieved by the operative clause feels himself obliged, in the interests of justice, to vote for the judgment, because if he voted the other way he might frustrate the correct

disposition of the case. The present phase of the proceedings in this case was in reality dominated by the question whether the Court could continue to deal with the case. On that absolutely essential point I reached the same conclusion as the Judgment, even if my grounds for doing so were different.

25 I have therefore been obliged to vote for the Judgment, even though I do not subscribe to any of its grounds. Had I voted otherwise I would have run the risk of contributing to the creation of a situation which would have been strange indeed for a Court whose jurisdiction is voluntary, a situation in which the merits of a case would have been considered even though the majority of the judges considered that they ought not to be. It is precisely that kind of situation which Article 8 of the Resolution concerning the Internal Judicial Practice of the Court is designed to avoid.

26 I have still to explain my position with regard to the question of the Court's jurisdiction, in the sense given to that term by the Order of 22 June 1973. As the Judgment expressly states, this many-faceted question is not examined therein. That being so, and as I personally do not feel any need to examine it in order to conclude in favour of the disposition of the case for which I have voted, I think that there is no place in this separate opinion for any account of the ideas I have formed on the subject. A separate opinion, as I conceive it, ought not to broach any questions not dealt with by the judgment, unless it is absolutely necessary to do so in order to explain the author's vote. I have therefore resisted the temptation to engage in an exchange of views on jurisdiction with those of my colleagues who have gone into this question in their dissenting opinions. A debate between judges on matters not dealt with in the judgment is not likely to add up to anything more than a series of unrelated monologues—or choruses. For whatever purpose it may serve, however, I must stress that my silence on the subject does not signify consent to the proposition that the Court had jurisdiction.

(Signed) Sture Petré.

Separate Opinion of Judge Ignacio-Pinto

Judge Ignacio-Pinto

[Translation]

1 I concur in the Judgment delivered by the Court in the second phase of this case, but without entirely sharing the grounds on which it has relied to reach the conclusion that the Australian claim “no longer has any object”.

2 Before explaining on what points my reasoning differs from that of the Court, I must refer to the Order of 22 June 1973, by which the Court, after having acceded to Australia's request for the indication of interim measures of protection, decided that the proceedings would next be concerned with the questions of jurisdiction and admissibility. The Court having thus defined the character which the present phase of the proceedings was to possess, I find myself, much to my regret, impelled not to criticize the Court's Judgment, but to present the following observations in order unequivocally to substantiate my separate opinion in the matter.

3 First I wish to confirm my view, already set forth in the dissenting opinion which I appended to the above-mentioned Order of 22 June 1973, that, considering the all too markedly political character of this case, Australia's request for the indication of interim measures of protection ought to have been rejected as ill founded. Now that we have come to the end of these proceedings and before going any further, I think it useful to recall certain statements emanating from the competent authorities of the Australian Government which give the plainest possible illustration of the political character of this case.

4 I would first draw attention to the statement made by the Prime Minister and Minister for Foreign

Affairs of Australia in a Note of 13 February 1973 to the Minister for Foreign Affairs of the French Government (Application, Ann. 11, p. 62) :

“In my discussion with your Ambassador on 8 February 1973, I referred to the strength of public opinion in Australia about the effects of French **tests** in the Pacific. I explained that the strength of public opinion was such that, *whichever political party was in office, it would be under great pressure to take action*. The Australian public would consider it intolerable if the **nuclear tests** proceeded during discussions to which the Australian Government had agreed.” (Emphasis added.)

Secondly I wish to recall what the Solicitor-General of Australia said at the hearing which the Court held on 22 May 1973 :

“May I conclude, Mr. President, by saying that few Orders of the Court would be more closely scrutinized than the one which the Court will make upon this application. *Governments and people all over the world will look behind the contents of that Order to detect what they may presume to be the Court's attitude towards the fundamental question of the legality of further **testing** of **nuclear** weapons in the atmosphere.*” (Emphasis added.)

5 It appears therefore, taking into account my appreciation of the political character of the claim, that it was from the beginning that, basing myself on this point, I had considered the claim of Australia to be without object.

6 That said, I now pass to the observations for which my appraisal of the Court's Judgment calls, together with the explanation of my affirmative vote.

7 First of all, I consider that the Court, having called upon the Applicant to continue the proceedings and return before it so that it might rule upon its jurisdiction to entertain the case and on the admissibility of the Application, ought to treat these two questions clearly, especially as certain erroneous interpretations appear to have lent credence among the lay public to the idea that Australia “had won its case against France”, since in the final analysis it had obtained the object of its claim, which was to have France forbidden to continue atmospheric **nuclear testing**.

8 As I see the matter, it is extremely regrettable that the Court should have thought it ought to omit doing this, so that unresolved problems remain with regard to the validity of the 1928 General Act, relied on by Australia, as also to the declaration filed under Article 36, paragraph 2, of the Statute and the express reservations made by France in 1966 so far as everything connected with its national defence was concerned. It would likewise have been more judicious to give an unequivocal ruling on the question of admissibility, having regard to what I consider to be the definitely political character revealed by the Australian claim, as I have recalled above.

9 These, I find, are so many important elements which deserved to be taken into consideration in order to enable the Court to give a clear pronouncement on the admissibility of Australia's claim, more particularly as the objective of this claim is to have the act of a sovereign State declared unlawful even though it is not possible to point to any positive international law.

10 I must say in these circumstances that I personally remain unsatisfied as to the procedure followed and certain of the grounds relied on by the Court for reaching the conclusion that the claim no longer has any object.

11 I nevertheless adhere to that conclusion, which is consistent with the position which I have maintained from the outset of the proceedings in the first phase; I shall content myself with the Court's recognition that the Australian Application “no longer” has any object, on the understanding, nevertheless, that for me it never had any object, and ought to have been declared

inadmissible *in limine litis* and, therefore, removed from the list for the reasons which I gave in the dissenting opinion to which I have referred above.

12 The fact remains that, to my mind, the Court was right to take the decision it has taken today. I gladly subscribe—at least in part—to the considerations which have led to its doing so, for, failing the adoption by the Court of my position on the issues of jurisdiction and the admissibility of the Australian claim, I would in any case have been of the view that it should take into consideration, at least *in the alternative*, the new facts which supervened in the course of the present proceedings and after the closure of the oral proceedings, to wit various statements by interested States, with a view to ascertaining whether circumstances might not have rendered the object of the Application nugatory. Since, in the event, it emerges that the statements *urbi et orbi* of the competent French authorities constitute an undertaking on the part of France to carry out no more **nuclear tests** in the atmosphere, I can only vote in favour of the Judgment.

13 It is in effect evident that one could not rule otherwise than the Court has done, when one analyses objectively the various statements emanating whether from the Applicant or from France, which, confident in the reservations embodied in the declaration filed under Article 36, paragraph 2, of the Statute, contested the Court's jurisdiction even before the opening of oral proceedings.

14 As should be re-emphasized, it cannot be denied that the essential object of Australia's claim is to obtain from the Court the cessation by France of the atmospheric **nuclear tests** it has been conducting in the atoll of Mururoa which is situated in the South Pacific and is under French sovereignty. Consequently, if France had changed its attitude, at the outset of the proceedings, and had acquiesced in Australia's request that it should no longer carry out its **tests**, the goal striven for by the Applicant would have been attained and its claim would no longer have had any object. But now the Court has been led by the course of events to take note that the President of the French Republic and his competent ministers have made statements to the effect that the South Pacific **test** centre will not be carrying out any more atmospheric **nuclear tests**. It follows that the goal of the Application has been attained. That is a material finding which cannot properly be denied, for it is manifest that the object of the Australian claim no longer has any real existence. That being so, the Court is bound to accord this fact objective recognition and to conclude that the proceedings ought to be closed, inasmuch as it has acquired the conviction that, taking the circumstances in which they were made into account, the statements of the competent French authorities are sufficient to constitute an undertaking on the part of France which connotes a legal obligation *erga omnes*, despite the unilateral character of that undertaking.

15 One may regret—and I do regret—that the Court, particularly at this stage, did not devote more of its efforts to seeking a way of first settling the questions of jurisdiction and admissibility. Some would doubtless go so far as strongly to criticize the grounds put forward by the Court to substantiate its decision. I could not take that attitude, for in a case so exceptionally characterized by politico-humanitarian considerations, and in the absence of any guiding light of positive international law, I do not think the Court can be blamed for having chosen, for the settlement of the dispute, the means which it considered to be the most appropriate in the circumstances, and to have relied upon the undertaking, made *urbi et orbi* in official statements by the President of the French Republic, that no more atmospheric **nuclear tests** will be carried out by the French Government. Thus the Judgment rightly puts an end to a case one of whose consequences would, in my opinion, be disastrous—I refer to the disregard of Article 36, paragraph 2, of the Statute of the Court—and would thereby be likely to precipitate a general flight from the jurisdiction of the Court, inasmuch as it would demonstrate that the Court no longer respects the expression of the will of a State which has subordinated its acceptance of the Court's compulsory jurisdiction to express reservations.

16 In spite of the criticisms which some of my colleagues have expressed in their opinions, and sharing as I do the opinion of Judge Forster, I will say, bearing in mind the old adage that “all roads

lead to Rome”, that I find the Judgment just and well founded and that there is, at all events, nothing in the French statements “which could be interpreted as an admission of any breach of positive international law”.

17 In conclusion, I would like to emphasize once again that I am fully in agreement, with Australia that all atmospheric **nuclear tests** whatever should be prohibited, in view of their untold implications for the survival of mankind. I am nevertheless convinced that in the present case the Court has given a proper Judgment, which meets the major anxieties which I expressed in the dissenting opinion to which I have referred, inasmuch as it must not appear to be flouting the principles expressed in Article 2, paragraph 7, of the United Nations Charter (Order of 22 June 1973, *I.C.J. Reports 1973*, p. 130), and indirectly inasmuch as it respects the principle of sovereign equality of the member States of the United Nations. France must not be given treatment inferior to that given to all other States possessing **nuclear** weapons, and the Court's competence would not be well founded if it related only to the French atmospheric **tests**.

(Signed) L. Ignacio-Pinto.

Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock

Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock

1. In its Judgment the Court decides, *ex proprio motu*, that the claim of the Applicant no longer has any object. We respectfully, but vigorously dissent. In registering the reasons for our dissent we propose first to make a number of observations designed to explain why, in our view, it is not justifiable to say that the claim of the Applicant no longer has any object. We shall then take up the issues of jurisdiction and admissibility which are not examined in the Judgment but which appear to us to be of cardinal importance to the Court's treatment of the matters decided in the Judgment. It is also to these two issues, not touched in the Judgment, to which the Applicant was specifically directed to address itself in the Court's Order of 22 June 1973.

Part I. Reasons for Our Dissent

2. Basically, the Judgment is grounded on the premise that the sole object of the claim of Australia is “to obtain a termination of” the “atmospheric **nuclear tests** conducted by France in the South Pacific region” (para. 30). It further assumes that, although the judgment which the Applicant seeks would have been rested on a finding that “further **tests** would not be consistent with international law, such finding would be only a means to an end, and not an end in itself” (*ibid.*).

3. In our view the basic premise of the Judgment, which limits the Applicant's submissions to a single purpose, and narrowly circumscribes its objective in pursuing the present proceedings, is untenable. In consequence the Court's chain of reasoning leads to an erroneous conclusion. This occurs, we think, partly because the Judgment fails to take account of the purpose and utility of a request for a declaratory judgment and even more because its basic premise fails to correspond to and even changes the nature and scope of Australia's formal submissions as presented in the Application.

4. In the Application Australia :

“... *Asks the Court to adjudge and declare that, for the abovementioned reasons or any of them or for any other reason that the Court deems to be relevant, the carrying out of further atmospheric **nuclear** weapon **tests** in the South Pacific Ocean is not consistent with applicable rules of international law.*”

and to Order

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

5. This submission, as observed by counsel for Australia before the Court (CR 73/3, p. 60) :

“... has asked the Court to do two things : the first is to adjudge and declare that the conduct of further atmospheric **nuclear tests** is contrary to international law and to Australia's rights ; the second is to order France to refrain from further atmospheric **nuclear tests**”.

As appears from the initial words of the actual submission, its first part requests from the Court a judicial *declaration* of the illegality of atmospheric **tests** conducted by France in the South Pacific Ocean.

6. In paragraph 19 of the Application it is stated that :

“The Australian Government will seek a declaration that the holding of further atmospheric **tests** by the French Government in the Pacific Ocean is not in accordance with international law and involves an infringement of the rights of Australia. The Australian Government will *also* request that, *unless* the French Government should give the Court an undertaking that the French Government will treat a declaration by the Court in the sense just stated as a sufficient ground for discontinuing further atmospheric **testing**, the Court should make an order calling upon the French Republic to refrain from any further atmospheric **tests**.” (Emphasis added.)

In other words, the request for a declaration is the essential submission. If a declaration of illegality were obtained from the Court which the French Government agreed to treat as a sufficient ground for discontinuing further atmospheric **tests**, then Australia would not maintain its request for an Order.

Consequently, it can hardly be said, as is done in paragraph 30 of the Judgment, that the declaration of illegality of atmospheric **tests** asked for in the first part of the Applicant's formal submission is merely a means for obtaining a Court Order for the cessation of further **tests**. On the contrary, the declaration of illegality is the basic claim submitted by Australia to the Court; and this request is indeed described in the Memorial (para. 430) as the “main prayer in the Application”.

7. The Applicant asks for a judicial declaration to the effect that atmospheric **nuclear tests** are “not consistent ... with international law”. This bare assertion cannot be described as constituting merely a reason advanced in support of the Order. The legal reasons invoked by the Applicant both in support of the declaration and the Order relate *inter alia* to the alleged violation by France of certain rules said to be generally accepted as customary law concerning atmospheric **nuclear tests**; and its alleged infringement of rights said to be inherent in the Applicant's own territorial sovereignty and of rights derived from the character of the high seas as *res communis*. These reasons, designed to support the submissions, are clearly distinguished in the pleadings from the decisions which the Court is asked to make. According to the terms of the submission the Court is requested to make the declaration of illegality “for the above-mentioned reasons or any of them or for any other reason that the Court deems to be relevant”. Isolated from those reasons or legal propositions, the declaration that atmospheric **nuclear tests** are “not consistent with applicable rules of international law” is the precise formulation of something that the Applicant is formally asking the Court to decide in *the operative part* of the Judgment. While “it is no part of the judicial function of the Court to declare in the operative part of its Judgment that any of those arguments is or is not well founded ¹”, to decide and declare that certain conduct of a State is or is not consistent with international law is of the essence of international adjudication, the heart of the Court's judicial function.

8. The Judgment asserts in paragraph 30 that “the original and ultimate objective of the Applicant

was and has remained to obtain a termination of those **tests**; thus its claim cannot be regarded as being a claim for a declaratory judgment". In our view the premise in no way leads to the conclusion. In international litigation a request for a declaratory judgment is normally sufficient even when the Applicant's ultimate objective is to obtain the termination of certain conduct of the Respondent which it considers to be illegal. As Judge Hudson said in his individual opinion in the *Diversion of Water from the Meuse* case :

"In international jurisprudence, however, sanctions are of a different nature and they play a different rôle, with the result that a declaratory judgment will frequently have the same compulsive force as a mandatory judgment ; States are disposed to respect the one not less than the other." (*P.C.I.J., Series A/B, No. 70, p. 79.*)

And, as Charles De Visscher has stated :

"The essential task of the Court, as emerges both from the submissions of the parties and from the operative parts of its judgments, normally amounts to no more than defining the legal relationships between the parties, without indicating any specific requirements of conduct. Broadly speaking, the Court refrains from pronouncing condemnations and leaves it to the States parties to the case to draw the conclusions flowing from its decisions ²." [*Translation.*]

9. A dual submission, like the one presented here, comprising both a request for a declaration of illegality and a prayer for an order or injunction to end certain measures is not infrequent in international litigation.

This type of dual submission, when presented in other cases has been considered by this Court and its predecessor as containing two independent formal submissions, the first or declaratory part being treated as a true submission, as an end in itself and not merely as part of the reasoning or as a means to obtain the cessation of the alleged unlawful activity. (*Diversion of Water from the Meuse, P.C.I.J., Series A/B, No. 70, pp. 5, 6 and 28 ; Right of Passage over Indian Territory, I.C.J. Reports 1960, pp. 10 and 31.*)

The fact that consequential requests for an Order or an equivalent injunction are made, as they were made in the above-mentioned cases, was not then considered and cannot be accepted as a sufficient reason to ignore or put aside the Applicant's primary submission or to dispose of it as part of the reasoning. Nor is it justified to introduce a conceptual dichotomy between declaratory and other judgments in order to achieve the same effect. The fact that the Applicant's submissions are not limited to a declaration of the legal situation but also ask for some consequential relief cannot be used to set aside the basic submission in which the declaration of the legal situation is asked to be made in the operative part of the judgment.

10. In the above-mentioned cases the judges who had occasion to analyse in detail in their individual opinions the Applicant's submissions recognized that in these basic submissions the Applicants sought a declaratory judgment from the Court. The individual opinion of Judge Hudson in the *Diversion of Water from the Meuse* case has already been mentioned. In the *Right of Passage over Indian Territory* case, Judges Winiarski and Badawi in their dissenting opinion recognized that : "What the Portuguese Government is asking of the Court, therefore, is that it shall deliver in the first place a declaratory judgment." They added something which is fully applicable to the present case :

"... although this claim is followed by the two others, complementary and contingent, it constitutes the very essence of the case ... The object of the suit, as it follows from the first Portuguese submission, is to obtain from the Court a recognition and statement of the situation at law between the Parties" (*I.C.J. Reports 1960, p. 74.*)

Judge Armand-Ugon in his dissenting opinion also said : “The Court is asked for a declaratory judgment as to the existence of a right of passage.” (*Ibid.*, p. 77.) And this approach was not limited to dissenting opinions. The Court's Judgment in that case states that the Applicant “invoked its right of passage and asked the Court to *declare* the existence of that right” (emphasis added) and also says :

“To this first claim Portugal adds two others, though these are conditional upon a reply, wholly or partly favourable, to the first claim, and will lose their purpose if the right alleged is not recognized.” (*Ibid.*, p. 29.)

11. In a case brought to the Court by means of an application the formal submissions of the parties define the subject of the dispute, as is recognized in paragraph 24 of the Judgment. Those submissions must therefore be considered as indicating the objectives which are pursued by an applicant through the judicial proceedings.

While the Court is entitled to interpret the submissions of the parties, it is not authorized to introduce into them radical alterations. The Permanent Court said in this respect : “... though it can construe the submissions of the Parties, it cannot substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced” (*P.C.I.J., Series A, No. 7*, p. 35, case concerning *Certain German Interests in Polish Upper Silesia*). The Judgment (para. 29) refers to this as a limitation on the power of the Court to interpret the submissions “when the claim is not properly formulated because the submissions of the parties are inadequate”. If, however, the Court lacks the power to reformulate inadequate submissions, *a fortiori* it cannot reformulate submissions as clear and specific as those in this case.

12. In any event, the cases cited in paragraph 29 of the Judgment to justify the setting aside in the present instance of the Applicant's first submission do not, in our view, provide any warrant for such a summary disposal of the “main prayer in the Application”. In those cases the submissions held by the Court not to be true submissions were specific propositions advanced merely to furnish reasons in support of the decision requested of the Court in the “true” final submission. Thus, in the *Fisheries* case the Applicant had summarized in the form of submissions a whole series of legal propositions, some not even contested, merely as steps logically leading to its true final submissions (*I.C.J. Reports 1951*, at pp. 121–123 and 126). In the *Minquiers and Ecrehos* case the “true” final submission was stated first and two legal propositions were then adduced by way of furnishing alternative grounds on which the Court might uphold it (*I.C.J. Reports 1953*, at p. 52); and in the *Nottebohm* case a submission regarding the naturalization of Nottebohm in Liechtenstein was considered by the Court to be merely “a reason advanced for a decision by the Court in favour of Liechtenstein” on the “real issue” of the admissibility of the claim (*I.C.J. Reports 1955*, at p. 16). In the present case, as we have indicated, the situation is quite otherwise. The legality or illegality of the carrying out by France of atmospheric **nuclear tests** in the South Pacific Ocean is the basic issue submitted to the Court's decision, and it seems to us as wholly unjustifiable to treat the Applicant's request for a declaration of illegality merely as reasoning advanced in support of its request for an Order prohibiting further **tests**.

13. In accordance with these basic principles, the true nature of the Australian claim, and of the objectives sought by the Applicant ought to have been determined on the basis of the clear and natural meaning of the text of its formal submission. The interpretation of that submission made by the Court constitutes in our view not an interpretation but a revision of the text, which ends in eliminating what the Applicant stated is “the main prayer in the Application”, namely the request for a declaration of illegality of **nuclear** atmospheric **tests** in the South Pacific Ocean. A radical alteration or mutilation of an applicant's submission under the guise of interpretation has serious consequences because it constitutes a frustration of a party's legitimate expectations that the case which it has put before the Court will be examined and decided. In this instance the serious consequences have an irrevocable character because the Applicant is now prevented from

resubmitting its Application and seising the Court again by reason of France's denunciation of the instruments on which it is sought to base the Court's jurisdiction in the present dispute.

14. The Judgment revises, we think, the Applicant's submission by bringing in other materials such as diplomatic communications and statements made in the course of the hearings. These materials do not justify, however, the interpretation arrived at in the Judgment. They refer to requests made repeatedly by the Applicant for an assurance from France as to the cessation of **tests**. But these requests for an assurance cannot have the effect attributed to them by the Judgment. While litigation is in progress an applicant may address requests to a respondent to give an assurance that it will not pursue the contested activity, but such requests cannot by themselves support the inference that an unqualified assurance, if received, would satisfy *all* the objectives the applicant is seeking through the judicial proceedings; still less can they restrict or amend the claims formally submitted to the Court. According to the Rules of Court, this can only result from a clear indication by the applicant to that effect, through a withdrawal of the case, a modification of its submissions or an equivalent action. It is not for nothing that the submissions are required to be presented in writing and bear the signature of the agent. It is a *non sequitur*, therefore, to interpret such requests for an assurance as constituting an implied renunciation, a modification or a withdrawal of the claim which is still maintained before the Court, asking for a judicial declaration of illegality of atmospheric **tests**. At the very least, since the Judgment attributes intentions and implied waivers to the Applicant, that Party should have been given an opportunity to explain its real intentions and objectives, instead of proceeding to such a determination *inaudita parte*.

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15. The Judgment, while it reiterates that the Applicant's objective has been to bring about the termination of atmospheric **nuclear tests**, fails to examine a crucial question, namely from what date the Applicant sought to achieve this objective. To answer this point it is necessary to take into account the date from which, according to the Australian submission, the legality of the French atmospheric **tests** is brought into question. The term "further atmospheric **tests**" used in the submission was also employed in the Australian diplomatic Note of 3 January 1973 addressed to the French Government. In that Note the claim as to the illegality of the **tests** and an express request to refrain from them were raised for the first time. When a State sends a communication asking another State "to refrain from any further acts" which are said to be illegal, it seems obvious that this claim and request refer to all acts which may take place after the date of the diplomatic communication. Similarly, when Australia filed its Application it seems evident that its request to the Court to declare the illegality of "further atmospheric **nuclear weapons tests**" must be understood as referring to all **tests** conducted as from 9 May 1973, the date of the Application.

While an injunction or an Order from the Court on the holding of "further atmospheric **tests**" could have effect only as from the date it is delivered, a judicial declaration of illegality like the one requested would embrace not merely subsequent **tests** but also those which took place in 1973 and **1974** after the Application was filed. That such was the objective of the Applicant is confirmed by the fact that as soon as the Application was filed Australia requested interim measures in order to protect its position with regard to the possible continuation of atmospheric **tests** by France after the filing of the Application and before the delivery of the Court's Judgment on the merits. A request for a declaration of illegality covering the atmospheric **tests** which were conducted in 1973 and **1974**, in disregard of the interim Order of the Court, could not be deprived of its object by statements of intention limited to **tests** to be conducted in 1975 or thereafter.

16. Such a view of the matter takes no account of the possibility of Australia seeking to claim compensation in respect of the 12 **tests** conducted in 1973 and **1974**. It is true that the Applicant has not asked for compensation for damage in the proceedings which are now before the Court. However, the Australian Government has not waived its right to claim them in the future. It has significantly stated in the Memorial (para. 435) that: "*At the present time*" (emphasis added),

it is not the “intention of the Australian Government to seek pecuniary damages”. The possibility cannot therefore be excluded that the Applicant may intend to claim damages, at a later date, through the diplomatic channel or otherwise, in the event of a favourable decision furnishing it with a declaration of illegality. Such a procedure, which has been followed in previous cases before international tribunals, would have been particularly understandable in a case involving radioactive fall-out in which the existence and extent of damage may not readily be ascertained before some time has elapsed.

17. In one of the instances in which damages have been claimed in a subsequent Application on the basis of a previous declaratory judgment, the Permanent Court endorsed this use of the declaratory judgment, stating that it was designed :

“... to ensure recognition of a situation at law, once and for all, and with binding force as between the Parties ; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned” (*Factory at Chorzów, P.C.I.J., Series A, No. 13, p. 20*).

18. Furthermore, quite apart from any claim to compensation for damage, a request for a declaration of the illegality of France's atmospheric **nuclear** weapon **tests** cannot be said to be without object in relation to the numerous **tests** carried out in 1973 and **1974**. The declaration, if obtained, would characterize those **tests** as a violation of Australia's rights under international law. As the Court's Judgment in the *Corfu Channel* case clearly confirms (**I.C.J. Reports 1949**, at p. 35) such a declaration is a form of “satisfaction” which the Applicant might have legitimately demanded when it presented its final submissions in the present proceedings, independently of any claim to compensation. Indeed, in that case the Court in the operative part of the Judgment pronounced such a declaration as constituting “in itself appropriate satisfaction” (*ibid.*, p. 36).

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19. The Judgment implies that there was a dispute between the Parties, but asserts that such a dispute has now disappeared because “the objective of the claim has been achieved by other means” (para. 55).

We cannot agree with this finding, which is based on the premise that the sole purpose of the Application was to obtain a cessation of **tests** as from the date of the Judgment. In our view the dispute between the Parties has not disappeared since it has concerned, from its origin, the question of the legality of the **tests** as from the date of the Application. It is true that from a factual point of view the extent of the dispute is reduced if no further atmospheric **tests** are conducted in 1975 and thereafter, but from a legal point of view the question which remains in dispute is whether the atmospheric **nuclear tests** which were in fact conducted in 1973 and **1974** were consistent with the rules of international law.

There has been no change in the position of the Parties as to that issue. Australia continues to ask the Court to declare that atmospheric **nuclear tests** are inconsistent with international law and is prepared to argue and develop that point. France, on its part, as recognized in the Judgment (para. 51), maintains the view that “its **nuclear** experiments have not violated any rule of international law”. In announcing the cessation of the **tests** in 1975 the French Government, according to the Judgment, did not recognize that France was bound by any rule of international law to terminate its **tests** (*ibid.*).

Consequently, the legal dispute between the Parties, far from having disappeared, still persists. A judgment by the Court on the legality of **nuclear** atmospheric **tests** in the South Pacific region would thus pronounce on a legal question in which the Parties are in conflict as to their respective rights.

20. We cannot accept the view that the decision of such a dispute would be a judgment *in abstracto*, devoid of object or having no *raison d'être*. On the contrary, as has been already shown, it would affect existing legal rights and obligations of the Parties. In case of the success of the Applicant, it would ensure for it advantages on the legal plane. In the event, on the other hand, of the Respondent being successful, it would benefit that Party by removing the threat of an unfounded claim. Thus a judgment on the legality of atmospheric **nuclear tests** would, as stated by the Court in the *Northern Cameroons* case :

“... have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations” (**I.C.J.** Reports 1963, p. 34).

In the light of this statement, a declaratory judgment stating the general legal position applicable between the Parties—as would the one pronouncing on the first part of the Applicant's submission—would have given the Parties certainty as to their legal relations. This desired result is not satisfied by a finding by the Court of the existence of a unilateral engagement based on a series of declarations which are somewhat divergent and are not accompanied by an acceptance of the Applicant's legal contentions.

Moreover, the Court's finding as to that unilateral engagement regarding the recurrence of atmospheric **nuclear tests** cannot, we think, be considered as affording the Applicant legal security of the same kind or degree as would result from a declaration by the Court specifying that such **tests** contravened general rules of international law applicable between France and Australia. This is shown by the very fact that the Court was able to go only so far as to find that the French Government's unilateral undertaking “cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration” (emphasis added) ; and that the obligation undertaken is one “the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed”.

21. Whatever may be thought of the Judgment in the *Northern Cameroons* case, the Court in that case recognized a critically significant distinction between holding a declaratory judgment to be “without effect” the subject of which (as in that case) was a treaty which was no longer in force and one which “interprets a treaty that *remains* in force” (emphasis added) or “*expounds a rule of customary law*” (emphasis added). As to both the latter, the Court said that the declaratory judgment would have a “continuing applicability” (**I.C.J.** Reports 1963, p. 37). In other words, according to the *Northern Cameroons* case a judgment cannot be said to be “without effect” or an issue moot when it concerns an analysis of the continuing applicability of a treaty in force or of customary international law. That is precisely the situation in the present case.

The present case, as submitted by the Applicant, concerns the continuing applicability of a potentially evolving customary international law, elaborated at numerous points in the Memorial and oral arguments. Whether all or any of the contentions of the Applicant would or would not be vindicated at the stage of the merits is irrelevant to the central issue that they are not manifestly frivolous or vexatious but are attended by legal consequences in which the Applicant has a legal interest. In the language of the *Northern Cameroons* case, a judgment dealing with them would have “continuing applicability”. Issues of both fact and law remain to be clarified and resolved.

The distinction drawn in the *Northern Cameroons* case is thus in keeping with the fundamental purpose of a declaratory judgment which is designed, in contentious proceedings involving a genuine dispute, to clarify and stabilize the legal relations of the parties. By foreclosing any argument on the merits in the present stage of the proceedings the Court has precluded this possibility. Accordingly, the Court, in our view, has not only wrongly interpreted the thrust of the Applicant's submissions, is has also failed to recognize the valid role which a declaratory judgment may play in reducing uncertainties in the legal relations of the parties and in composing potential discord.

* * *

22. In paragraph 23 the Judgment states that the Court has “inherent” jurisdiction enabling it to take such action as may be required. It asserts that it must “ensure” the observance of the “inherent limitations on the exercise of the judicial function of the Court” and “maintain its judicial character”. It cites the *Northern Cameroons* case in support of these very general statements.

Without pausing to analyse the meaning of the adjective “inherent”, it is our view that there is nothing whatever in the concept of the integrity of the judicial process (“inherent” or otherwise) which suggests, much less compels, the conclusion that the present case has become “without object”. Quite the contrary, due regard for the judicial function, properly understood, dictates the reverse.

The Court, “whose function is to decide in accordance with international law such disputes as are submitted to it” (Art. 38, para. 1, of the Statute), has the duty to hear and determine the cases it is seised of and is competent to examine. It has not the discretionary power of choosing those contentious cases it will decide and those it will not. Not merely requirements of judicial propriety, but statutory provisions governing the Court’s constitution and functions impose upon it the primary obligation to adjudicate upon cases brought before it with respect to which it possesses jurisdiction and finds no ground of inadmissibility. In our view, for the Court to discharge itself from carrying out that primary obligation must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require. In the present case we are very far from thinking that any such considerations exist.

23. Furthermore, any powers which may attach to “the inherent jurisdiction” of the Court and its duty “to maintain its judicial character” invoked in the Judgment would, in our view, require it at least to give a hearing to the Parties or to request their written observations on the questions dealt with and determined by the Judgment. This applies in particular to the objectives the Applicant was pursuing in the proceedings, and to the question of the status and scope of the French declarations concerning future **tests**. Those questions could not be examined fully and substantially in the pleadings and hearings, since the Parties had received definite directions from the Court that the proceedings should “first be addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application”. No intimation or suggestion was ever given to the Parties that this direction was no longer in effect or that the Court would go into other issues which were neither pleaded nor argued but which now form the basis for the final disposal of the case.

It is true that counsel for the Applicant alluded to the first French declaration of intention during one of the hearings, but he did so only as a prelude to his treatment of the issues of jurisdiction and admissibility and in the context of a review of developments in relation to the proceedings. He was moreover then acting under formal directions from the Court to deal exclusively with the questions of jurisdiction and admissibility of the Application. Consequently, counsel for the Applicant could not and did not address himself to the specific issues now decided in the Judgment, namely what were the objectives sought by the Applicant by the judicial proceedings and whether the French declarations and statements had the effect of rendering the claim of Australia without object.

The situation is in this respect entirely different from that arising in the *Northern Cameroons* case where the Parties had full opportunity to plead, both orally and in writing, the question whether the claim of the Applicant had an object or had become “moot” before this was decided by the Court.

Accordingly, there is a basic contradiction when the Court invokes its “inherent jurisdiction” and its “judicial character” to justify its disposal of the case, while, at the same time, failing to accord the Applicant any opportunity whatever to present a countervailing argument.

No-one doubts that the Court has the power in its discretion to decide certain issues *ex proprio*

motu. The real question is not one of power, but whether the exercise of power in a given case is consonant with the due administration of justice. For all the reasons noted above, we are of the view that, in the circumstances of this case, to decide the issue of “mootness” without affording the Applicant any opportunity to submit counter-arguments is not consonant with the due administration of justice.

In addition, we think that the Respondent should at least have been notified that the Court was proposing to consider the possible effect on the present proceedings of declarations of the French Government relating to its policy in regard to the conduct of atmospheric **tests** in the future. This was essential, we think, since it might, and did in fact lead the Court to pronounce upon nothing less than France's obligations, said to have been unilaterally undertaken, with respect to the conduct of such **tests**.

24. The conclusions above are reinforced when consideration is paid to the relationship between the issue of mootness and the requirements of the judicial process.

It is worth observing that a finding that the Applicant's claim no longer has any object is only another way of saying that the Applicant no longer has any stake in the outcome. Located in the context of an adversary proceeding, the implication is significant.

If the Applicant no longer has a stake in the outcome, i.e., if the case is really moot, then the judicial process tends to be weakened, inasmuch as the prime incentive for the Applicant to argue the law and facts with sufficient vigour and thoroughness is diluted. This is one of the reasons which justifies declaring a case moot, since the integrity of the judicial process presupposes the existence of conflicting interests and requires not only that the parties be accorded a full opportunity to explore and expose the law and facts bearing on the controversy but that they have the incentive to do so.

Applied to the present case, it is immediately apparent that this reason for declaring a case moot or without object is totally missing, a conclusion which is not nullified by the absence of the Respondent in this particular instance.

The Applicant, with industry and skill, has already argued the nature of its continuing legal interest in the dispute and has urged upon the Court the need to explore the matter more fully at the stage of the merits. The inducement to do so is hardly lacking in light of the Applicant's submissions and the nature and purposes of a declaratory judgment.

25. Furthermore the Applicant's continued interest is manifested by its conduct. If, as the Judgment asserts, all the Applicant's objectives have been met, it would have been natural for the Applicant to have requested a discontinuance of the proceedings under Article 74 of the Rules. This it has not done. Yet this Article, together with Article 73 on settlement, provides for the orderly regulation of the termination of proceedings once these have been instituted. Both Articles require formal procedural actions by agents, in writing, so as to avoid misunderstandings, protect the interests of each of the two parties and provide the Court with the certainty and security necessary in judicial proceedings.

* * *

26. Finally, we believe the Court should have proceeded, under Article 36 (6) and Article 53 of the Statute, to determine its own jurisdiction with respect to the present dispute. This is particularly important in this case because the French Government has challenged the existence of jurisdiction at the time the Application was filed, and, consequently, the proper seising of the Court, alleging that the 1928 General Act is not a treaty in force and that the French reservation concerning matters of national defence made the Court manifestly incompetent in this dispute. In the *Northern Cameroons* case, invoked in paragraph 23 of the Judgment, while the Respondent had raised

objections to the jurisdiction of the Court, it recognized that the Trusteeship Agreement was a convention in force at the time of the filing of the Application. There was no question then that the Court had been regularly seised by way of application.

27. In our view, for the reasons developed in the second part of this opinion, the Court undoubtedly possesses jurisdiction in this dispute. The Judgment, however, avoids the jurisdictional issue, asserting that questions related to the observance of “the inherent limitations on the exercise of the Court's judicial function” require to be examined in priority to matters of jurisdiction (paras. 22 and 23). We cannot agree with this assertion. The existence or lack of jurisdiction with respect to a specific dispute is a basic statutory limitation on the exercise of the Court's judicial function and should therefore have been determined in the Judgment as Article 67, paragraph 6, of the Rules of Court seems clearly to expect.

28. It is difficult for us to understand the basis upon which the Court could reach substantive findings of fact and law such as those imposing on France an international obligation to refrain from further **nuclear tests** in the Pacific, from which the Court deduces that the case “no longer has any object”, without any prior finding that the Court is properly seised of the dispute and has jurisdiction to entertain it. The present Judgment by implication concedes that a dispute existed at the time of the Application. That differentiates this case from those in which the issue centres on the existence *ab initio* of any dispute whatever. The findings made by the Court in other cases as to the existence of a dispute at the time of the Application were based on the Court's jurisdiction to determine its own competence, under the Statute. But in the present case the Judgment disclaims any exercise of that statutory jurisdiction. According to the Judgment the dispute has disappeared or has been resolved by engagements resulting from unilateral statements in respect of which the Court “holds that they constitute an undertaking possessing legal effect” (para. 51) and “finds that France has undertaken the obligation, to hold no further **nuclear tests** in the atmosphere in the South Pacific” (para. 52). In order to make such a series of findings the Court must possess jurisdiction enabling it to examine and determine the legal effect of certain statements and declarations which it deems relevant and connected to the original dispute. The invocation of an alleged “inherent jurisdiction ... to provide for the orderly settlement of all matters in dispute” in paragraph 23 cannot provide a basis to support the conclusions reached in the present Judgment which pronounce upon the substantive rights and obligations of the Parties. An extensive interpretation appears to be given in the Judgment to that inherent jurisdiction “on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes of” providing “for the orderly settlement of all matters in dispute” (para. 23). But such an extensive interpretation of the alleged “inherent jurisdiction” would blur the line between the jurisdiction conferred to the Court by the Statute and the jurisdiction resulting from the agreement of States. In consequence, it would provide an easy and unacceptable way to bypass a fundamental requirement firmly established in the jurisprudence of the Court and international law in general, namely that the jurisdiction of the Court is based on the consent of States.

The conclusion thus seems to us unavoidable that the Court, in the process of rendering the present Judgment, has exercised substantive jurisdiction without having first made a determination of its existence and the legal grounds upon which that jurisdiction rests.

29. Indeed, there seems to us to be a manifest contradiction in the jurisdictional position taken up by the Court in the Judgment. If the so-called “inherent jurisdiction” is considered by the Court to authorize it to decide that France is now under a legal obligation to terminate atmospheric **nuclear tests** in the South Pacific Ocean, why does the “inherent jurisdiction” not also authorize it on the basis of that same international obligation, to decide that the carrying out of any further such **tests** would “not be consistent with applicable rules of international law” and to order that “the French Republic shall not carry out any further such **tests**”? In other words, if the Court may pronounce upon France's legal obligations with respect to atmospheric **nuclear tests**, why does it not draw from this pronouncement the appropriate conclusions in relation to the Applicant's

submissions instead of finding them no longer to have any object? The above observation is made solely with reference to the concept of “inherent jurisdiction” developed in the Judgment and is of course not addressed to the merits of the case, which are not before the Court at the present stage.

* * *

Since we consider a finding both as to the Court's jurisdiction and as to the admissibility of the Application to be an essential basis for the conclusions reached in the Judgment as well as for our reasons for dissenting from those conclusions, we now proceed to examine in turn the issues of jurisdiction and admissibility which confront the Court in the present case.

Part II. Jurisdiction

Introduction

30. At the outset of the present proceedings the French Government categorically denied that the Court has any competence to entertain Australia's Application of 9 May 1973; and it has subsequently continued to deny that there is any legal basis for the Court's Order of 22 June 1973 indicating provisional measures of protection or for the exercise of any jurisdiction by the Court with respect to the matters dealt with in the Application. The Court, in making that Order for provisional measures, stated that the material submitted to it led to the conclusion, at that stage of the proceedings, that the jurisdictional provisions invoked by the Applicant appeared “prima facie, to afford a basis on which the jurisdiction of the Court might be founded”. At the same time, it directed that the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application should be the subject of the pleadings in the next stage of the case, that is, in the proceedings with which the Court is now concerned. In our view, these further proceedings confirm that the jurisdictional provisions invoked by the Applicant not merely afforded a wholly sufficient basis for the Order of 22 June 1973 but also provided a valid basis for establishing the competence of the Court in the present case.

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31. The Application specifies as independent and alternative bases of the Court's jurisdiction:

“(i) Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, read together with Articles 36 (1) and 37 of the Statute of the Court. Australia and the French Republic both acceded to the General Act on 21 May 1931. The texts of the conditions to which their accessions were declared to be subject are set forth in Annex 15 and Annex 16 respectively.

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

It follows that, if these are indeed two independent and alternative ways of access to the Court and one of them is shown to be effective to confer jurisdiction in the present case, this will suffice to establish the Court's jurisdiction irrespective of the effectiveness or ineffectiveness of the other. As the Court stated in its Judgment on the *Appeal Relating to the Jurisdiction of the ICAO Council*, if the Court is invested with jurisdiction on the basis of one set of jurisdictional clauses “it becomes irrelevant to consider the objections to other possible bases of jurisdiction” (*J.C.J. Reports 1972*, p. 60).

* * *

The General Act of 1928

32. Article 17 of the General Act of 1928 reads as follows:

“All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice.”

The disputes “mentioned in Article 36 of the Statute of the Permanent Court” are all or any of the classes of legal disputes concerning:

- (a)** the interpretation of a treaty;
- (b)** any question of international law;
- (c)** the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d)** the nature or extent of the reparation to be made for the breach of an international obligation.

33. The same four classes of legal disputes are reproduced word for word, in Article 36 (2)—the optional clause—of the Statute of the present Court which, together with the declarations of Australia and France, constitutes the second basis of jurisdiction invoked in the Application.

34. Accordingly, the jurisdiction conferred on the Court under Article 17 of the General Act of 1928 and under the optional clause of the present Statute, in principle, covers the same disputes: namely the four classes of legal disputes listed above. In the present instance, however, the bases of jurisdiction resulting from these instruments are clearly not co-extensive because of certain differences between the terms of the Parties' accessions to the General Act and the terms of their declarations accepting the optional clause. In particular, France's declaration under the optional clause excepts from the Court's jurisdiction “disputes concerning activities connected with national defence”, whereas no such exception appears in her accession to the General Act of 1928. Consequently, it is necessary to examine the two bases of jurisdiction separately.

* * *

35. The French Government, in its letter of 16 May 1973 addressed to the Registrar, and in the Annex to that letter, put forward the view that the present status of the General Act of 1928 and the attitude of the Parties, more especially of France, in regard to it preclude that Act from being considered today as a clear expression of France's will to accept the Court's jurisdiction. It maintained that, since the demise of the League of Nations, the Act of 1928 is recognized either as no longer being in force or as having lost its efficacy or as having fallen into desuetude. In support of this view, the French Government agreed that the Act of 1928 was, ideologically, an integral part of the League of Nations system “in so far as the pacific settlement of international disputes had necessarily in that system to accompany collective security and disarmament”; that there was correspondingly a close link between the Act and the structures of the League, the Permanent Court of International Justice, the Council, the Secretary-General, the States Members and the Secretariat; that these links were emphasized in the terms of certain of the accessions to the Act, including those of Australia, New Zealand and France; and that this was also shown by the fact that Australia and New Zealand, in acceding to the Act, made reservations regarding disputes with States not members of the League. It further argued that the integration of the Act into the structure of the League of Nations was shown by the fact that, after the latter's demise, the necessity was recognized of a revision of the Act, substituting new terms for those of the defunct system instead

merely of relying on the operation of Article 37 of the Statute of the Court. This, according to the French Government, implied that the demise of the League was recognized as having rendered it impossible for the General Act of 1928 to continue to function normally.

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36. The fact that the text of the General Act of 1928 was drawn up and adopted within the League of Nations does not make it a treaty of that Organization; for even a treaty adopted within an organization remains the treaty of its parties. Furthermore, the records of the League of Nations Assembly show that it was deliberately decided not to make the General Act an integral part of the League of Nations structure (Ninth Ordinary Session, *Minutes of the First Committee*, p. 68); that the General Act was not intended to be regarded as a constitutional document of the League or adjunct of the Covenant (*ibid.*, p. 69); that the General Act was envisaged as operating parallel to, and not as part of the League of Nations system (*ibid.*, p. 71); and that the substantive obligations of the parties under the General Act were deliberately made independent of the functions of the League of Nations. Stressing the last point, Mr. Rolin of Belgium said specifically:

“The intervention of the Council of the League was not implied as a matter of necessity in the General Act; the latter had been regarded as being of use in connection with the general work of the League, *but it had no administrative or constitutional relationship with it.*” (*Ibid.*, p. 71 ; emphasis added.)

That the French Government also then understood the pacific settlement system embodied in the General Act to be independent of that of the Covenant of the League of Nations was made clear when the ratification of the Act was laid before the French *Chambre des députés*, whose *Commission des affaires étrangères* explained:

“... alors que, dans le système conçu par les fondateurs de la Société des Nations, l'action du Conseil, telle quelle est prévue par l'article 15, constitue un mode normal de règlement des différends au même titre que la procédure d'arbitrage, *l'Acte général, au contraire, ignore complètement le Conseil de la Société des Nations*” (*Journal officiel, documents parlementaires, Chambre, 1929, p. 407; emphasis added.*)

37. Australia and France, it is true, inserted reservations in their accessions to the General Act designed to ensure the priority of the powers of the Council of the League over the obligations which they were assuming by acceding to the Act. But the fact that they and some other States thought it desirable so to provide in their instruments of accession seems to testify to the independent and essentially autonomous character of the General Act rather than to its integration in the League of Nations system. Similarly, the fact that, in order to exclude disputes with non-member States from their acceptance of obligations under the Act, Australia and some other States inserted an express reservation of such disputes in their instruments of accession, serves only to underline that the Covenant and the General Act were separate systems of pacific settlement. The reservation was needed for the very reason that the General Act was established as a universal system of pacific settlement independent of the League of Nations and open to States not members of the Organization, as well as to Members (cf. Report of Mr. Politis, as Rapporteur, 18th Plenary Meeting of 25 September 1928, at p. 170).

38. Nor do we find any more convincing the suggested “ideological integration” of the General Act in the League of Nations system: i.e., the thesis of its inseparable connection with the League's trilogy of collective security, disarmament and pacific settlement. Any mention of a connection between those three subjects is conspicuously absent from the General Act, which indeed makes no reference at all to security or disarmament, unlike certain other instruments of the same era. In these circumstances, the suggestion that the General Act was so far intertwined with the League of Nations system of collective security and disarmament as necessarily to have vanished with that system cannot be accepted as having any solid basis.

39. Indeed, if that suggestion had a sound basis, it would signify the extinction of numerous other treaties of pacific settlement belonging to the same period and having precisely the same ideological approach as the General Act of 1928. Yet these treaties, without any steps having been taken to amend or to “confirm” them, are unquestionably considered as having remained in force despite the dissolution of the League of Nations in 1946. As evidence of this two examples will suffice: the Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927, Article 17 of which was applied by this Court as the source of its jurisdiction in the *Barcelona Traction, Light and Power Company, Limited* case (*I.C.J. Reports 1964*, at pp. 26–39); and the Franco-Spanish Treaty of Arbitration of 10 July 1929 on the basis of which France herself and Spain constituted the *Lac Lanoux* arbitration in 1956 (*UNRIAA*, Vol. 12, at p. 285). In truth, these treaties and the General Act itself, although largely inspired by the League of Nations aim of promoting the peaceful settlement of disputes together with collective security and disarmament, also took their inspiration from the movement for the development of international arbitration and judicial settlement which had grown up during the nineteenth century and had played a major role at the Hague Peace Conferences of 1899 and 1907. It was, moreover, the French Government itself which in the General Assembly in 1948 emphasized this quite separate source of the “ideology” of the General Act of 1928. Having referred to the General Act as “a valuable document inherited from the League of Nations”, the French delegation added that it constituted:

“... an integral part of a long tradition of arbitration and conciliation which had proved itself effective long before the existence of the League itself” (*GA, OR, Third Session, Plenary Meeting, 199th Meeting*, p. 193).

That tradition certainly did not cease with the League of Nations.

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40. The General Act of 1928 was, however, a creation of the League of Nations era, and the machinery of pacific settlement which it established almost inevitably exhibited some marks of that origin. Thus, the tribunal to which judicial settlement was to be entrusted was the Permanent Court of International Justice (Art. 17); if difficulties arose in agreeing upon members of a conciliation commission, the parties were empowered, as one possible option, to entrust the appointment to the President of the Council of the League (Art. 6); the Conciliation Commission was to meet at the seat of the League, unless otherwise agreed by the parties or otherwise decided by the Commission's President (Art. 9); a Conciliation Commission was also empowered in all circumstances to request assistance from the Secretary-General of the League (Art. 9); if a deadlock arose in effecting the appointment of members of an arbitral tribunal, the task of making the necessary appointments was entrusted to the President of the Permanent Court of International Justice (Art. 23); in cases submitted to the Permanent Court, it was empowered to lay down “provisional measures” (Art. 33), and to decide upon any third party's request to intervene (Art. 36) and its Registrar was required to notify other parties to a multilateral convention the construction of which was in question (Art. 37); the Permanent Court was also entrusted with a general power to determine disputes relating to the interpretation or application of the Act (Art. 41); the power to extend invitations to non-member States to become parties to the General Act was entrusted to the Council of the League (Art. 43); and, finally, the depositary functions in connection with the Act were entrusted to the Secretary-General of the League (Arts. 43–47). The question has therefore to be considered whether these various links with the Permanent Court and with the Council of the League of Nations and its Secretariat are of such a character that the dissolution of these organs in 1946 had the necessary result of rendering the General Act of 1928 unworkable and virtually a dead letter.

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41. In answering this question, account has first to be taken of Article 37 of the Statute of this Court, on which the Applicant specifically relies for the purpose of founding the Court's jurisdiction on Article 17 of the 1928 Act. Article 37 of the Statute reads:

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

The objects and purposes of that provision were examined at length by this *Court in the Barcelona Traction, Light and Power Company, Limited case (New Application, Preliminary Objections, I.C.J. Reports 1964*, at pp. 31–36) where, *inter alia*, it said:

“The intention therefore was to create a special régime which, as between the parties to the Statute, would automatically transform references to the Permanent Court in these jurisdictional clauses, into references to the present Court.

In these circumstances it is difficult to suppose that those who framed Article 37 would willingly have contemplated, *and would not have intended to avoid, a situation in which the nullification of the jurisdictional clauses whose continuation it was desired to preserve, would be brought about by the very event—the disappearance of the Permanent Court—the effects of which Article 37 both foresaw and was intended to parry; or that they would have viewed with equanimity the possibility that, although the Article would preserve many jurisdictional clauses, there might be many others which it would not; thus creating that very situation of diversification and imbalance which it was desired to avoid.*” (P. 31, emphasis added.)

In a later passage the Court was careful to enter the *caveat* that Article 37 was not intended “to prevent the operation of causes of extinction other than the disappearance of the Permanent Court” (*ibid.*, p. 34). However, it continued:

“And precisely because it was the sole object of Article 37 to prevent extinction resulting from the particular cause which the disappearance of the Permanent Court would represent, *it cannot be admitted that this extinction should in fact proceed to follow from this very event itself.*” (*Ibid.*, emphasis added.)

42. The Court's observations in that case apply in every particular to the 1928 Act. It follows that the dissolution of the Permanent Court in 1946 was in itself wholly insufficient to bring about the termination of the Act. Unless some other “cause of extinction” is shown to prevent the Act from being considered as “a treaty or convention in force” at the date of the dissolution of the Permanent Court, Article 37 of the Statute automatically has the effect of substituting this Court for the Permanent Court as the tribunal designated in Article 17 of the General Act for the judicial settlement of disputes. And Article 37, in our opinion, also has the effect of automatically substituting this Court for the Permanent Court in Articles 33, 36, 37 and 41 of the General Act.

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43. Account has further to be taken of the arrangements reached in 1946 between the Assembly of the League and the General Assembly of the United Nations for the transfer to the United Nations Secretariat of the depositary functions performed by the League Secretariat with respect to treaties. Australia and France, as Members of both organizations, were parties to these arrangements and are, therefore, clearly bound by them. In September 1945 the League drew up a *List of Conventions with Indication of the Relevant Articles Conferring Powers on the Organs of the League of Nations*, the purpose of which was to facilitate consideration of the transfer of League functions to the United Nations in certain fields. In this list appeared the General Act of 1928, and there can be no doubt that when resolutions of the two Assemblies provided in 1946 for the transfer of the depositary functions of the League Secretariat to the United Nations Secretariat, the 1928 Act was understood as, in principle, included in those resolutions. Thus, the first list published by the Secretary-General in 1949 of multilateral treaties in respect of which he acts as depositary contained the General Act of 1928 (*Signatures, Ratifications, Acceptances, Accessions,*

etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary, UN Publications, 1949, Vol. 9). Moreover, in a letter of 12 June 1974, addressed to Australia's Permanent Representative and presented by Australia to the Court, the Secretary-General expressly confirmed that the 1928 Act was one of the "multilateral treaties placed under the custody of the Secretary-General by virtue of General Assembly resolution 24 (I) of 12 February 1946".

44. Consequently, on the demise of the League of Nations in 1946, the depositary functions entrusted to the Secretary-General and Secretariat of the League of Nations by Articles 43 to 47 of the 1928 Act were automatically transferred to the Secretary-General and Secretariat of the United Nations. It follows that the demise of the League of Nations could not possibly constitute "a cause of extinction" of the General Act by reason of the references to the League Secretariat in those Articles.

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45. The disappearance of the League of Nations system, it is true, did slightly impair the full efficacy of the machinery provided for in the 1928 Act. In conciliation, recourse could no longer be had to the President of the Council as one of the means provided by Article 6 of the Act for resolving disagreements in the appointment of members of the conciliation commission; nor could the commission any longer assert the right under Article 9 of the Act to meet at the seat of the League and to request assistance from the Secretary-General of the League. As to arbitration, it became doubtful whether Article 37 of the Statute would suffice, in the event of the parties' disagreement, to entrust to the President of this Court the extra-judicial function of appointing members of an arbitral tribunal entrusted by Article 23 of the 1928 Act to the President of the Permanent Court. In both conciliation and arbitration, however, the provisions involving League organs concerned machinery of a merely alternative or ancillary character, the disappearance of which could not be said to render the 1928 Act as a whole unworkable or impossible of performance. Nor could their disappearance be considered such a fundamental change of circumstances as might afford a ground for terminating or withdrawing from the treaty (cf. Art. 62 of the Vienna Convention on the Law of Treaties). Moreover, none of these provisions touched, still less impaired, the procedure for judicial settlement laid down in Article 17 of the 1928 Act.

46. Another provision the efficacy of which was impaired by the dissolution of the League was Article 43, under which the power to open accession to the General Act to additional States was given to the Council of the League. The disappearance of the Council put an end to this method of widening the operation of the 1928 Act and prejudiced, in consequence, the achievement of a universal system of pacific settlement founded on the Act. It did not, however, impair in any way the operation of the Act as between its parties. Indeed, in principle, it did not preclude the parties to the Act from agreeing among themselves to open it to accession by additional States.

47. Analysis of the relevant provisions of the General Act of 1928 thus suffices, by itself, to show that neither the dissolution of 1946 of the Permanent Court of International Justice nor that of the several organs of the League of Nations can be considered as "a cause of extinction" of the Act. This conclusion is strongly reinforced by the fact, already mentioned, that a large number of treaties for the pacific settlement of disputes, clauses of which make reference to organs of the League, are undoubtedly accepted as still in force; and that some of them have been applied in practice since the demise of the League. For present purposes, it is enough to mention the application by France herself and by Spain of their bilateral Treaty of Arbitration of 10 July 1929 as the basis for the constitution of the *Lac Lanoux* Arbitral Tribunal in 1956 (*UNRIIAA*, Vol. 12, at p. 285). That convention was conspicuously a treaty of the League of Nations era, containing references to the Covenant and to the Council of the League as well as to the Permanent Court. Moreover, some of those references did not deal with the mere machinery of peaceful settlement procedures, but with matters of substance. Article 20, for example, expressly reserved to the

parties, in certain events, a right of unilateral application to the Council of the League; and Article 21, which required provisional measures to be laid down by any tribunal dealing with a dispute under the treaty, provided that “it shall be the duty of the Council of the League of Nations, if the question is brought before it, to ensure that suitable provisional measures be taken”. Those Articles provided for much more substantial links with organs of the League than anything contained in the 1928 Act; yet both France and Spain appear to have assumed that the treaty was in force in 1956 notwithstanding the demise of the League.

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The So-Called Revision of the General Act

48. In the case of the 1928 Act, the French Government maintains that the so-called revision of the General Act undertaken by the General Assembly in 1948 implies that the demise of the League was recognized as having rendered it impossible for the 1928 Act to continue to function normally. This interpretation of the proceedings of the General Assembly and the Interim Committee regarding the “revision” of the Act does not seem to us sustainable. Belgium introduced her proposal for the revision of the 1928 Act in the Interim Committee at a time when the General Assembly was engaged in revising a number of treaties of the League of Nations era in order to bring their institutional machinery and their terminology into line with the then new United Nations system. It is therefore understandable that, notwithstanding the automatic transfers of functions already effected by Article 37 of the Statute and General Assembly resolution 24 (I), the Interim Committee and the General Assembly should have concerned themselves with the replacement of the references in the General Act to the Permanent Court, the Council of the League and the League Secretariat by references to their appropriate counterparts in the United Nations system.

49. In any event, what began as a proposal for the revision of the 1928 General Act was converted in the Interim Committee into the preparation of a text of a new Revised General Act which was to be opened for accession as an entirely independent treaty. This was to avoid the difficulty that certain of the parties to the 1928 Act, whose agreement was necessary for its revision, were not members of the United Nations and not taking part in the revision (cf. Arts. 39 and 40 of the Vienna Convention on the Law of Treaties). As the Belgian delegation explained to the Interim Committee, the consent of the parties to the 1928 Act would now be unnecessary “since in its final form their proposal did not suppress or modify the General Act, as established in 1928, *but left it intact as also, therefore, whatever rights the parties to that Act might still derive from it*” (emphasis added). This explanation was included in the Committee's report to the General Assembly and, in our opinion, clearly implies that the 1928 Act was recognized to be a treaty still in force in 1948. Moreover, the records of the debates contain a number of statements by individual delegations indicating that the 1928 Act was then understood by them to be in force; and those statements did not meet with contradiction from any quarter.

50. Equally, the mere fact that the General Assembly drew up and opened for accession a new Revised General Act could not have the effect of putting an end to, or undermining the validity of, the 1928 Act. In the case of the amendment of multilateral treaties, the principle is well settled that the amending treaty exists side by side with the original treaty, the latter remaining in force unamended as between those of its parties which have not established their consent to be bound by the amending treaty (cf. Art. 40 of the Vienna Convention on the Law of Treaties). Numerous examples of the application of this principle are to be found precisely in the practice of the United Nations regarding the amendment of League of Nations Treaties; and it was this principle to which the General Assembly gave expression in the preamble to its resolution 268A (III), by which it instructed the Secretary-General to prepare and open to accession the text of the Revised Act. The preamble to the resolution, *inter alia*, declared:

“Whereas the General Act, thus amended, will only apply as between States having acceded thereto, *and, as a consequence, will not affect the rights of such States, parties*

to the Act as established on 26 September 1928, as should claim to invoke it in so far as it might still be operative.” (Emphasis added.)

It is therefore evident that the General Assembly neither intended that the Revised General Act should put an end to its predecessor, the 1928 Act, nor understood that this would be the result of its adoption of the Revised Act. Such an intention in the General Assembly would indeed have been surprising when it is recalled that the “revision” of the General Act was undertaken in the context of a programme for encouraging the development of methods for the pacific settlement of disputes.

51. In the above-quoted clause of the preamble, it is true, resolution 268A (III) qualifies the statement that the amendments would not affect rights of parties to the 1928 Act by the words “in so far as it might still be operative”. Moreover, in another clause of the preamble the resolution also speaks of its being “expedient to restore to the General Act its original efficacy, impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared”. We cannot, however, accept the suggestion that by these phrases the General Assembly implied that the 1928 Act was no longer capable of functioning normally. These phrases find a sufficient explanation in the fact, which we have already mentioned, that the disappearance of the League organs and the Permanent Court would affect certain provisions regarding alternative methods for setting up conciliation commissions or arbitral tribunals, which might in the event of disagreements impair the efficacy of the procedures provided by the Act.

52. But there was also another reason for including those words in the preamble to which the Interim Committee drew attention in its report (UN doc. A/605, para. 46):

“Thanks to a few alterations, the new General Act would, for the benefit of those States acceding thereto, restore the original effectiveness of the machinery provided in the Act of 1928, an Act which, though still theoretically in existence, has largely become inapplicable.

It was noted, for example, that *the provisions of the Act relating to the Permanent Court of International Justice had lost much of their effectiveness in respect of parties which are not members of the United Nations or parties to the Statute of the International Court of Justice.*” (Emphasis added.)

In 1948 several parties to the 1928 Act were neither members of the United Nations nor parties to the Statute of this Court so that, even with the aid of Article 37 of the Statute, the provisions in the 1928 Act on judicial settlement were not “operative” as between them and other parties to the Act. Therefore, in this respect also it could properly be said that the original efficacy of the 1928 Act had been impaired. On the other hand, the clear implication, *a contrario*, of the Interim Committee's report was that the provisions of the 1928 Act concerning judicial settlement—Article 17—had not lost their efficacy as between those of its parties who were parties to the Statute of this Court.

* * *

The Question of the Continued Force of the 1928 Act

53. Equally, we do not find convincing the thesis put forward by the French Government that the 1928 Act cannot serve as a basis for the competence of the Court because of “the desuetude into which it has fallen since the demise of the League of Nations system”. Desuetude is not mentioned in the Vienna Convention on the Law of Treaties as one of the grounds for termination of treaties, and this omission was deliberate. As the International Law Commission explained in its report on the Law of Treaties:

“... while ‘obsolescence’ or ‘desuetude’ may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty”

(Yearbook of the International Law Commission, 1966, Vol. II, p. 237).

In the present instance, however, we find it impossible to imply from the conduct of the parties in relation to the 1928 Act, and more especially from that of France prior to the filing of the Application in this case, their consent to abandon the Act.

54. Admittedly, until recently the Secretary-General was not called upon to register any new accession or other notification in relation to the 1928 Act. But this cannot be considered as evidence of a tacit agreement to abandon the treaty, since multilateral treaties not infrequently remain in force for long periods without any changes in regard to their parties.

55. Nor is such evidence to be found in the fact, referred to in the Annex to the French Government's letter of 16 May 1973, that "Australia and Canada did not feel, in regard to the Act, any need to regularize their reservations of 1939 as they did those expressed with regard to their optional declarations". The reservations in question, made by both countries four days after the outbreak of the Second World War, notified the depositary that they would not regard their accessions to the 1928 Act as "covering or relating to any dispute arising out of events occurring during the present crisis". These reservations were not in accord with Article 45 of the 1928 Act, which permitted modification of the terms of an accession only at the end of each successive five-year period for which the Act runs unless denounced. But both countries justified the reservations on the basis of the breakdown of collective security under the League and the resulting fundamental changes in the circumstances existing when they acceded to the Act; and if that justification was well founded there was no pressing need to "regularize" their reservations in 1944 when the current five-year period was due to expire. Nor would it be surprising if in that year of raging war all over the globe they should not have had their attention turned to this question. Moreover, the parallelism suggested between the position of these two countries under the 1928 Act and under the optional clause is in any case inexact. Their declarations under the optional clause expired in 1940, so that they were called upon to re-examine their declarations; under Article 45 of the 1928 Act, on the other hand, their accessions remained in force indefinitely unless denounced.

56. A more general argument in the Annex to the letter of 16 May 1973, regarding a lack of parallelism in States' acceptance respectively of the 1928 Act and the optional clause, also appears to us unconvincing. The desuetude of the 1928 Act, it is said, ought to be inferred from the following facts: up to 1940 reservations made to the 1928 Act and to the optional clause were always similar but after that date the parallelism ceased; reservations to the optional clause then became more restrictive and yet the same States appeared unconcerned with the very broad jurisdiction to which they are said to have consented under the Act.

57. Even before 1940, however, the suggested parallelism was by no means complete. Thus, France's declaration of 19 September 1929, accepting the optional clause, did not contain the reservation of matters of domestic jurisdiction which appeared in her accession to the 1928 Act; and the declarations made in that period by Australia, Canada, New Zealand and the United Kingdom did not exclude disputes with nonmember States, as did their accessions to the 1928 Act. The provisions of Articles 39 and 45 of the Act in any case meant that there were material differences in the conditions under which compulsory jurisdiction was accepted under the two instruments. Moreover, even granting that greater divergencies appear in the two systems after 1940, this is open to other explanations than the supposed desuetude of the 1928 Act. The more striking of these divergencies arise from reservations to the optional clause directed to specific disputes either already existing or imminently expected. Whereas under the optional clause many States have placed themselves in a position to change the terms of their declarations in any manner they may wish, without notice and with immediate effect, their position under the 1928 General Act is very different by reason of the provisions of Articles 39 and 45 regulating the making and taking effect of reservations. Because of these provisions a new reservation to the 1928 Act

directed to a specific matter of dispute may serve only to alert the attention of the other party to the State's obligations under the Act and hasten a decision to institute proceedings before the reservation becomes effective under Article 45. In short, any parallelism between the optional clause and the 1928 Act is in this respect an illusion.

58. As to the further suggestion in the above-mentioned letter that if the 1928 Act were still in force the refusal of Australia, New Zealand and France to become parties to the Revised General Act would be difficult to explain, this does not appear to us to bear a moment's examination. Since 1946, the 1928 Act has had a limited number of existing parties and has been open to accession only by a small and finite group of other States, while the Revised General Act is open to accession by a much wider and still expanding group of States. Accordingly, it is no matter for surprise that parties to the 1928 General Act should have been ready simply to continue as such, while not prepared to take the new step of assuming more wide-ranging commitments under the Revised Act. Even more decisive is the fact that, of the six parties to the 1928 Act which have become parties to the Revised Act, at least four are on record as formally recognizing that the 1928 Act is also still in force for them.

59. It follows that, in our opinion, the various considerations advanced in the French Government's letter and Annex of 16 May 1973 fall far short of establishing its thesis that the 1928 Act must now be considered as having fallen into desuetude. Even if this were not the case, the State practice in relation to the Act in the post-war period, more especially that of France herself, appears to us to render that thesis manifestly untenable.

* * *

Evidence of the 1928 Act's Continuance in Force

60. Between the dissolution of the League of Nations in April 1946 and Australia's invocation of the 1928 Act in her Application of 9 May 1973 there occurred a number of examples of State practice which confirm that, so far from abandoning the Act, its parties continued to recognize it as a treaty in force. The first was the conclusion of the Franco-Siamese Settlement Agreement on 17 November 1946 for the purpose of re-establishing the pre-war territorial situation on Siam's borders and renewing friendly relations between the two countries. Siam was not a party to the General Act of 1928, but in the Franco-Siamese Treaty of Friendship of 1937 she had agreed to apply the provisions of the Act for the settlement of any disputes with France. Under the Settlement Agreement of 1946 France and Siam agreed to constitute immediately "a Conciliation Commission, composed of the representatives of the Parties and three neutrals, in accordance with the General Act of Geneva of 26 September 1928 for the Pacific Settlement of International Disputes, which governs the constitution and working of the Commission". The 1928 Act, it is true, applied between France and Siam, not as such, but only through being incorporated by reference into the 1937 Treaty of Friendship. But it is difficult to imagine that in November 1946, a few months after she had participated in the dissolution of the League, France should have revived the operation of the provisions of the 1928 Act in her relations with Siam if she had believed the dissolution of the League to have rendered that Act virtually defunct.

61. In 1948–1949, as we have already pointed out, a number of member States in the debates and the General Assembly in resolution 268A (III) referred to the 1928 Act, as still in force, and met with no contradiction. In 1948 also the 1928 Act was included in New Zealand's official treaty list published in that year. Again, in 1949, the Norwegian Foreign Minister, in reporting to parliament on the Revised Act, stated that the 1928 Act was still in force, and in 1950 the Swedish Government did likewise in referring the Revised Act to the Swedish parliament. Similarly, in announcing Denmark's accession to the Revised Act in 1952, the Danish Government referred to the 1928 Act as still in force.

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62. Accordingly, France was doing no more than conform to the general opinion when in 1956 and 1957 she made the 1928 Act one of the bases of her claim against Norway before this Court in the *Certain Norwegian Loans* case (*I.C.J. Reports 1957*, p. 9). In three separate passages of her written pleadings France invoked the 1928 Act as a living, applicable, treaty imposing an obligation upon Norway to submit the dispute to arbitration; for in each of these passages she characterized Norway's refusal to accept arbitration as a violation, *inter alia*, of the General Act of 1928 (*I.C.J. Pleadings, Certain Norwegian Loans* case, Vol. I, at pp. 172, 173 and 180). She did so again in a diplomatic Note of 17 September 1956, addressed to the Norwegian Government during the course of the proceedings and brought to the attention of the Court (*ibid.*, p. 211), and also at the oral hearings (*ibid.*, Vol. II, p. 60). The reason was that Norway's refusal to arbitrate was a specific element in the French claim that Norway was not entitled unilaterally to modify the conditions of the loans in question "without negotiation with the holders, with the French State which has adopted the cause of its nationals, or without arbitration ..." (*I.C.J. Reports 1957*, at p. 18, emphasis added). Consequently, the explanation given in the Annex to the French Government's letter of 16 May 1973 that it had confined itself in the *Certain Norwegian Loans* case "to a very brief reference to the General Act, without relying on it expressly as a basis of its claim", is not one which it is possible to accept.

63. Nor do we find the further explanation given by the French Government in that Annex any more convincing. In effect this is that, if the 1928 Act had been considered by France to be valid at the time of the *Certain Norwegian Loans* case, she would have used it to found the jurisdiction of the Court in that case so as to "parry the objection which Norway was to base upon the reciprocity clause operating with reference to the French Declaration"; and that her failure to found the Court's jurisdiction on the 1928 Act "is only explicable by the conviction that in 1955 it had fallen into desuetude". This explanation does not hold water for two reasons. First, it does not account for the French Government's repeated references to the 1928 Act as imposing an obligation on Norway in 1955 to arbitrate, one of which included a specific mention of Chapter II of the Act relating to judicial settlement. Secondly, it is not correct that France, by founding the Court's jurisdiction on the Act, would have been able to escape the objection to jurisdiction under the optional clause raised by Norway on the basis of a reservation in France's declaration; and it is unnecessary to look further than to Article 31, paragraph 1, of the 1928 Act for the reason why France did not invoke the Act as a basis for the Court's jurisdiction. This paragraph reads:

"In the case of a dispute the occasion of which, according to the municipal law of one of the parties, falls within the competence of its judicial or administrative authorities, *the party in question may object to the matter in dispute being submitted for settlement by the different methods laid down in the present General Act until a decision with final effect has been pronounced...*" (Emphasis added.)

Since the French bond holders had deliberately abstained from taking any action in the Norwegian tribunals, the above clear and specific provision of Article 31 constituted a formidable obstacle to establishing the Court's jurisdiction on the basis of the 1928 Act.

64. Thus, the position taken by France in the *Certain Norwegian Loans* case, so far from being explicable only on the basis of a conviction of the desuetude of the Act, provides evidence of the most positive kind of her belief in its continued validity and efficacy at that date. As to Norway, it is enough to recall her Government's statement in Parliament in 1949 that the 1928 Act remained in force, and to add that at no point in the *Certain Norwegian Loans* case did Norway question either the validity or the efficacy of the Act as an instrument applicable between herself and France at that date.

65. Furthermore, the interpretation placed in the Annex on the treatment of the 1928 Act by the Court and Judge Basdevant in the *Certain Norwegian Loans* case does not seem to us to be sustained by the record of the case. The Court did not, as the French Government maintains, have

to decide the question of the 1928 Act. Stressing that France had based her Application “clearly and precisely on the Norwegian and French declarations under Article 36, paragraph 2, of the Statute”, the Court held it “would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application...”. Having so held, it examined the question of its jurisdiction exclusively by reference to the parties' declarations under the optional clause and made no mention of the 1928 Act. As to Judge Basdevant, at the outset of his dissenting opinion (p. 71) he emphasized that on the question of jurisdiction he did not dispute the point of departure on which the Court had placed itself. In holding that the matters in dispute did not fall within the reservation of matters of domestic jurisdiction, on the other hand, he expressly relied on the 1928 Act as one of his grounds for so holding. The fact that the Court did not follow him in this approach to the interpretation of the reservation cannot, in our view, be understood as meaning that it rejected his view as to the 1928 Act's being in force between France and Norway. Indeed, if that had been the case, it is almost inconceivable that Judge Basdevant could have said, as he did, of the 1928 Act: “At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway” (*I.C.J. Reports 1957*, p. 74).

66. The proceedings in the *Certain Norwegian Loans* case, therefore, in themselves constitute unequivocal evidence that the 1928 Act did survive the demise of the League and was recognized by its parties, in particular by France, as in force in the period 1955–1957. We may add that in this period statements by parties to the 1928 Act are also to be found in the records of the proceedings of the Council of Europe leading to the adopting of the European Convention for the Pacific Settlement of International Disputes in 1957, which show that they considered the Act to be still in force. A Danish delegate, for example, stated in the Consultative Assembly in 1955, without apparent contradiction from anyone, that the 1928 Act “binds twenty States”.

67. No suggestion is made in the letter of 16 May 1973 or its Annex that, if the 1928 Act was in force in 1957, there was nevertheless some development which deprived it of validity before Australia filed her Application; nor does the information before the Court indicate that any such development occurred. On the contrary, the evidence consistently and pointedly confirms the belief of the parties to the 1928 Act as to its continuance in force. In 1966 Canada's official publication *The Canada Treaty Series: 1928–1964* listed the 1928 Act as in force ; as likewise did Finland's list in the following year. In Sweden the treaty list published by the Ministry of Foreign Affairs in 1969 included the 1928 Act, with a footnote “still in force as regards some countries”. In 1971 the Netherlands Minister for Foreign Affairs, in submitting the Revised Act for parliamentary approval, referred to the 1928 Act as an agreement to which the Netherlands is a party and, again, as an Act “which is still in force for 22 States”; and Australia's own official treaty list published in that year included the 1928 Act. In addition, the 1928 Act appears in a number of unofficial treaty lists compiled in different countries.

68. As to France herself, there is nothing in the evidence to show any change of position on her part regarding the 1928 Act prior to the filing of Australia's Application on 9 May 1973. Indeed, a written reply to a deputy in the National Assembly, explaining why France was not contemplating ratification of the European Convention for the Pacific Settlement of Disputes, gives the opposite impression. That reply stated that, like the majority of European States, France was already bound by numerous obligations of pacific settlement amongst which was mentioned “l'Acte général d'arbitrage du 26 septembre 1928 révisé en 1949”. The French Government, in a footnote in the *Livre blanc sur les expériences nucléaires*, has drawn attention to the confused character of the reference to the 1928 Act revised in 1949. Even so, and however defective the formulation of the written reply, it is difficult to understand it in any other way than as confirming the position taken up by the French Government in the *Certain Norwegian Loans* case, that the 1928 Act was to be considered as a treaty in force with respect to France ; for France had not ratified the Revised General Act and could be referred to as bound by the General Act only in its original form, the 1928 Act.

69. Accordingly, we are bound to conclude that the 1928 Act was a treaty in force between Australia and France on 9 May 1973 when Australia's Application in the present case was filed. Some months after the filing of the Application, on 10 January **1974**, the French Government transmitted to the Secretary-General a notification of its denunciation of the Act, without prejudice to the position which it had taken regarding the lack of validity of the Act. Under the settled jurisprudence of the Court, however, such a notification could not have any retroactive effect on jurisdiction conferred upon the Court earlier by the filing of the Application; the *Nottebohm* case (*Preliminary Objection*, **I.C.J.** Reports 1953, at pp. 120–124).

70. Nor, in our view, can the conclusion that the 1928 Act was a treaty in force between Australia and France on 9 May 1973 be in any way affected by certain action taken with respect to the Act since that date by two other States, India and the United Kingdom. In the case concerning *Trial of Pakistani Prisoners of War*¹, by a letter of 24 June 1973 India informed the Court of its view that the 1928 Act had ceased to be a treaty in force upon the disappearance of the organs of the League of Nations. Pakistan, however, expressed a contrary view and has since addressed to the Secretary-General a letter from the Prime Minister of Pakistan affirming that she considers the Act as continuing in force. Again, although the United Kingdom, in a letter of 6 February **1974**, referred to doubts having been raised as to the continued legal force of the Act and notified the Secretary-General of its denunciation of the Act in conformity with the provisions of paragraph 2 of Article 45, it did so in terms which do not prejudge the question of the continuance in force of the Act. In any event, against these inconclusive elements of State practice in relation to the 1928 Act which have occurred since the filing of Australia's Application, we have to set the many indications of the Act's continuance in force, some very recent, to which we have already drawn attention. Moreover, it is axiomatic that the termination of a multilateral treaty requires the express or tacit consent of all the parties, a requirement which is manifestly not fulfilled in the present instance.

We are therefore clearly of the opinion that Article 17 of the 1928 Act, in combination with Article 37 of the Statute of the Court, provided Australia with a valid basis for submitting the **Nuclear Tests** case to the Court on 9 May 1973, subject only to any particular difficulty that might arise in the application of the Act between Australia and France by reason of reservations made by either of them. This question we now proceed to examine.

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Applicability of the 1928 Act as Between Australia and France

71. The French Government has urged in the Annex to its letter of 16 May 1973 that, even if the 1928 Act should be considered as not having lost its validity, it would still not be applicable as between Australia and France by reason of two reservations made by Australia to the Act itself and, in addition, a reservation made by France to its Declaration under the optional clause of 20 May 1966.

72. The Australian reservations to the 1928 Act here in question are (1) a clause allowing the temporary suspension of proceedings under the Act in the case of a dispute that was under consideration by the Council of the League of Nations and (2) another clause excluding from the scope of the Act disputes with any State party to the Act but not a member of the League of Nations. The disappearance of the League of Nations, it is said, means that there is now uncertainty as to the scope of these reservations; and this uncertainty, it is further said, is entirely to the advantage of Australia and unacceptable.

73. The clause concerning suspension of proceedings was designed merely to ensure the primacy of the powers of the Council of the League in the handling of the disputes; and the disappearance of the Council, in our opinion, left intact the general obligations of pacific settlement undertaken in the Act itself. Indeed, a similar reservation was contained in a number of the declarations made under the optional clause of the Statute of the Permanent Court of International

Justice, and there has never been any doubt that those declarations remained effective notwithstanding the demise of the Council of the League. Thus, in the *Anglo-Iranian Oil Co.* case the declarations of both Parties contained such a reservation and yet it was never suggested that the demise of the Council of the League had rendered either of them ineffective. On the contrary, Iran invoked the reservation, and the United Kingdom contested Iran's right to do so only on the ground that the merits of the dispute were not under consideration by the Security Council (**I.C.J.** *Pleadings, Anglo-Iranian Oil Co. case*, pp. 282 and 367–368). Furthermore, France's own accession to the 1928 Act contained a reservation in much the same terms and yet in the *Certain Norwegian Loans* case she does not seem to have regarded this fact as any obstacle to the application of the Act between herself and Norway.

74. Equally, the disappearance of the League of Nations cannot be considered as having rendered the general obligations of pacific settlement embodied in the 1928 Act inapplicable by reason of Australia's reservation excluding disputes with States not members of the League. This Court has not hesitated to apply the term Member of the League of Nations in connection with the Mandate of South West Africa (**I.C.J.** *Reports 1950*, pp. 138, 158–159 and 169; *South West Africa cases*, **I.C.J.** *Reports 1962*, pp. 335–338) ; nor has the Secretary-General in discharging his functions as depositary of the League of Nations multilateral treaties open to participation by States "Members of the League of Nations".

75. Should any question arise in a case today concerning the application of either of the two reservations found in Australia's accession to the 1928 Act, it would be for the Court to determine the status of the reservation and to appreciate its meaning and effect. Even if the Court were to hold that one or other reservation was no longer capable of application, that would not detract from the essential validity of Australia's accession to the 1928 Act. Moreover, owing to the well-settled principle of reciprocity in the application of reservations, any uncertainty that might exist as to the scope of reservations could not possibly work entirely to the advantage of Australia. It may be added that France has not suggested that the present case itself falls within the operation of either reservation.

76. In the light of the foregoing considerations, we are unable to see in Australia's reservations any obstacle to the applicability of the 1928 Act as between her and France.

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77. Another and quite different ground is, however, advanced by the French Government for considering the 1928 Act inapplicable between France and Australia with respect to the present dispute. The terms of the declarations of the two countries under the optional clause, it is said, must be regarded as prevailing over the terms of their accessions to the 1928 Act. In consequence, even on the hypothesis of the validity of the 1928 Act, the reservations in France's declaration of 1966 under the optional clause are, she maintains, to be treated as applicable. Those reservations include the one which excepts from France's acceptance of jurisdiction under the optional clause "disputes concerning activities connected with national defence" ; and according to the French Government that reservation necessarily covers the present dispute regarding atmospheric **nuclear** weapon **tests** conducted by France.

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78. One argument advanced in support of that contention is that, the Statute of the Court being an integral part of the Charter of the United Nations, the obligations of Members undertaken on the basis of the optional clause of the Statute must in virtue of Article 103 of the Charter be regarded as prevailing over their obligations under the 1928 Act. This argument appears to us to be based on a misconception. The Charter itself places no obligation on member States to submit their disputes to judicial settlement, and any such obligation assumed by a Member under the optional clause of the Statute is therefore undertaken as a voluntary and additional obligation which does not fall within

the purview of Article 103. The argument is, in any case, self-defeating because it could just as plausibly be argued that the obligations undertaken by parties to the 1928 Act are obligations under Article 36 (1) of the Statute and thus also obligations under the Charter.

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79. The French Government, however, also rests the contention on the ground that the situation here is analogous to one where there is “a later treaty relating to the same subject-matter as a treaty concluded earlier in the relations between the same countries”. In short, according to the French Government, the declarations of the Parties under the optional clause are to be considered as equivalent to a later treaty concerning acceptance of compulsory jurisdiction which, being a later expression of the wills of the Parties, should prevail over the earlier Act of 1928, relating to the same subject-matter. In developing this argument, we should add, the French Government stresses that it does not wish to be understood as saying that, whenever any treaty contains a clause conferring jurisdiction on the Court, a party may release itself from its obligations under that clause by an appropriate reservation inserted in a subsequent declaration under the optional clause. The argument applies only to the case of a treaty, like the General Act, “the exclusive object of which is the peaceful settlement of disputes, and in particular judicial settlement”.

80. This argument appears to us to meet with a number of objections, not the least of which is the fact that “treaties and conventions in force” and declarations under the optional clause have always been regarded as two different sources of the Court's compulsory jurisdiction. Jurisdiction provided for in treaties is covered in paragraph 1 of Article 36 and jurisdiction under declarations accepting the optional clause in paragraph 2 ; and the two paragraphs deal with them as quite separate categories. The paragraphs reproduce corresponding provisions in Article 36 of the Statute of the Permanent Court, which were adopted to give effect to the compromise reached between the Council and other Members of the League on the question of compulsory jurisdiction. The compromise consisted in the addition, in paragraph 2, of an optional clause allowing the establishment of the Court's compulsory jurisdiction over legal disputes between any States ready to accept such an obligation by making a unilateral declaration to that effect. Thus, the optional clause was from the first conceived of as an independent source of the Court's jurisdiction.

81. The separate and independent character of the two sources of the Court's jurisdiction—treaties and unilateral declarations under the optional clause—is reflected in the special provisions inserted in the present Statute for the purpose of preserving the compulsory jurisdiction attaching to the Permanent Court at the time of its dissolution. Two different provisions were considered necessary to achieve this purpose : Article 36 (5) dealing with jurisdiction under the optional clause, and Article 37 with jurisdiction under “treaties and conventions in force”. The separate and independent character of the two sources is also reflected in the jurisprudence of both Courts. The Permanent Court in its Order refusing provisional measures in the *Legal Status of the South-Eastern Territory of Greenland* case and with reference specifically to a clause in the 1928 Act regarding provisional measures, underlined that a legal remedy would be available “even independently of the acceptance by the Parties of the optional clause” (*P.C.I.J., Series A/B, No. 48*, at p. 289). Again, in the *Electricity Company of Sofia and Bulgaria* case the Permanent Court held expressly that a bilateral treaty of conciliation, arbitration and judicial settlement and the Parties' declarations under the optional clause opened up separate and cumulative ways of access to the Court ; and that if examination of one of these sources of jurisdiction produced a negative result, this did not dispense the Court from considering “the other source of jurisdiction invoked separately and independently from the first” (*P.C.I.J., Series A/B, No. 77*, at pp. 76 and 80). As to this Court, in the *Barcelona Traction, Light and Power Company, Limited* case it laid particular emphasis on the fact that the provisions of Article 37 of the Statute concerning “treaties and conventions in force” deal with “a different category of instrument” from the unilateral declarations to which Article 36 (5) relates (*I.C.J. Reports 1964*, at p. 29). More recently, in the *Appeal Relating to the Jurisdiction of the ICAO Council* case the Court based one of its conclusions specifically on

the independent and autonomous character of these two sources of its jurisdiction (**I.C.J.** Reports 1972, at pp. 53 and 60).

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82. In the present instance, this objection is reinforced by the fact that the 1928 Act contains a strict code of rules regulating the making of reservations, whereas no such rules govern the making of reservations to acceptances of the Court's jurisdiction under the optional clause. These rules, which are to be found in Articles 39, 40, 41, 43 and 45 of the Act, impose restrictions, *inter alia*, on the kinds of reservations that are admissible and the times at which they may be made and at which they will take effect. In addition, a State accepting jurisdiction under the optional clause may fix for itself the period for which its declaration is to run and may even make it terminable at any time by giving notice, whereas Article 45 (1) of the Act prescribes that the Act is to remain in force for successive fixed periods of five years unless denounced at least six months before the expiry of the current period. That the framers of the 1928 Act deliberately differentiated its régime in regard to reservations from that of the optional clause is clear ; for the Assembly of the League, when adopting the Act, simultaneously in another resolution drew the attention of States to the wide possibilities of limiting the extent of commitments under the optional clause "both as regards duration and as regards scope". Consequently, to admit that reservations made by a State under the uncontrolled and extremely flexible system of the optional clause may automatically modify the conditions under which it accepted jurisdiction under the 1928 Act would run directly counter to the strict system of reservations deliberately provided for in the Act.

83. The French Government evidently feels the force of that objection ; for it suggests that its contention may be reconciled with Article 45 (2) of the Act, which requires any changes in reservations to be notified at least six months before the end of the current five-year period of the Act's duration, by treating France's reservations made in her 1966 declaration as having taken effect only at the end of the then current period, namely in September 1969. This suggestion appears, however, to disregard the essential nature of a reservation. A reservation, as Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties records, is :

"... a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".

Thus, in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations. The mere fact that it never seems to have occurred to the Secretary-General of the League or of the United Nations that reservations made in declarations under the optional clause are of any concern whatever to parties to the General Act shows how novel is this suggestion.

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84. The novelty is further underlined by the fact that, whenever States have desired to establish a link between reservations to jurisdiction under the optional clause and jurisdiction under a treaty, this has been done by an express provision to that effect. Thus, the parties to the Brussels Treaty of 17 March 1948 agreed in Article VIII to refer to the Court all disputes falling within the scope of the optional clause subject only, in the case of each of them, to any reservation already made by that party when accepting that clause. Even in that treaty, we observe, the parties envisaged the application to jurisdiction under the treaty only of optional clause reservations "already made". Article 35, paragraph 4, of the European Convention for the Peaceful Settlement of Disputes goes

further in that it empowers a party at any time, by simple declaration, to make the same reservations to the Convention as it may make to the optional clause. But under this Article a specific declaration, made with particular reference to the European Convention, is needed in order to incorporate reservations contained in a party's declaration under the optional clause into its acceptance of jurisdiction under the Convention. Moreover, the power thus given by Article 35, paragraph 4, of the Convention is expressly subjected to the general restrictions on the making of reservations laid down in paragraph 1 of that Article, which confine them to reservations excluding "disputes concerning particular cases or clearly specified special matters, such as territorial disputes, or disputes falling within clearly defined categories" (language taken directly from Art. 39, para. 2 (c), of the 1928 Act). It therefore seems to us abundantly clear that the European States which framed these two European treaties assumed that declarations under the optional clause, whether prior or subsequent to the treaty, would not have any effect on the jurisdictional obligations of the parties under the treaty, unless they inserted an express provision to that effect; and that this they were only prepared to agree to under conditions specially stipulated in the treaty in question.

85. The question of the relation between reservations made under the optional clause and jurisdiction accepted under treaties has received particular attention in the United States in connection with the so-called "Connally Amendment", the adoption of which by the Senate resulted in the United States inserting in its declaration under the optional clause its well-known "self-judging" form of reservation with regard to matters of domestic jurisdiction. Two years later, the United States signed the Pact of Bogotá, a general inter-American treaty of pacific settlement which conferred jurisdiction on the Court for the settlement of legal disputes "in conformity with Article 36 (2) of the Statute". The United States, however, made its signature subject to the reservation that its acceptance of compulsory jurisdiction under the Pact is to be limited by "any jurisdictional or other limitations contained in any declaration deposited by the United States under the optional clause and in force at the time of the submission of any case". It thus appears to have recognized that its reservations to the optional clause would not be applicable unless it made provision for this specially by an appropriate reservation to the Pact of Bogota itself. This is confirmed by the facts that, whenever it has desired the Connally reservation to apply to jurisdiction conferred by treaty, the United States has insisted on the inclusion of a specific provision to that effect, and that the Department of State has consistently advised that, without such a provision, the Connally reservation will not apply (cf. *American Journal of International Law*, 1960, pp. 941-942, and, *ibid.*, 1961, pp. 135-141). Moreover, the Department of State has taken this position not merely with reference to jurisdictional clauses attached to treaties dealing with a particular subject-matter, but also with reference to optional protocols, the sole purpose of which was to provide for the judicial settlement of certain categories of legal disputes (cf. *Whitman's Digest of International Law*, Vol. 12, p. 1333). On this point, the United States appears clearly to recognize that any jurisdiction conferred by treaty on the Court under Article 36 (1) of the Statute is both separate from and independent of jurisdiction conferred on it under Article 36 (2) by accepting the optional clause. Thus, in a report on ratification of the Supplementary Slavery Convention, the Foreign Relations Committee of the Senate said: "Inasmuch as the Connally amendment applies to cases referred to the Court under Article 36 (2), it does not apply to cases referred under Article 36 (1) which would include cases arising out of this Convention." (*US Senate, 90 Congress, 1st Session, Executive Report No. 17*, p. 5.)

86. In our opinion, therefore, the suggestion that the reservation made by France in her optional clause declaration of 1966 ought to be considered as applicable to the Court's jurisdiction under the 1928 Act does not accord with either principle or practice.

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87. It remains to consider the French Government's main thesis that the terms of its 1966 declaration must be held to prevail over those of the 1928 Act on the ground that the optional

clause declarations of France and Australia are equivalent to a later treaty relating to the same subject-matter as the 1928 Act. This proposition seems probably to take its inspiration from the dissenting opinions of four judges in the *Electricity Company of Sofia and Bulgaria* case (*P.C.I.J., Series A/B, No. 77*), although the case itself is not mentioned in the French Government's letter of 16 May 1973. These judges, although their individual reasoning differed in some respects, were at one in considering that a bilateral treaty of conciliation, arbitration and judicial settlement concluded between Belgium and Bulgaria in 1931 should prevail over the declarations of the two Governments under the optional clause, as being the later agreement between them. Quite apart, however, from any criticisms that may be made of the actual reasoning of the opinions, they provide very doubtful support for the proposition advanced by the French Government. This is because the situation in that case was the reverse of the situation in the present case; for there the bilateral treaty was the more recent "agreement". It is one thing to say that a subsequent treaty, mutually negotiated and agreed, should prevail over an earlier agreement resulting from separate unilateral acts ; it is quite another to say that a State, by its own unilateral declaration alone, may alter its obligations under an existing treaty.

88. In any event, the thesis conflicts with the Judgment of the Permanent Court in that case ; and is diametrically opposed to the position taken by France and by Judge Basdevant on this question in the *Certain Norwegian Loans* case as well as with that taken by this Court in the *Appeal Relating to the Jurisdiction of the ICAO Council* case. In the *Electricity Company of Sofia and Bulgaria* case, while regarding the two optional clause declarations as amounting to an agreement, the Permanent Court held that they and the 1931 treaty constituted independent and alternative ways of access to the Court both of which, and each under its own conditions, could be used cumulatively by the Applicant in trying to establish the Court's jurisdiction. It based its decision on what it found was the intention of the Parties in entering into the multiplicity of agreements :

"... the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to *open up new ways of access to the Court rather than to close old ways or allow them to cancel each other out with the ultimate result that no jurisdiction would remain*" (emphasis added; *P.C.I.J., Series A/B, No. 77*, p. 76).

Moreover, as indications of this intention, it underlined that both Parties had argued their cases "in light of the conditions independently laid down by each of these two agreements" ; and that:

"Neither the Bulgarian nor the Belgian Government at any time considered the possibility that *either of these agreements might have imposed some restriction on the normal operation of the other during the period for which they were both in force.*" (*Ibid.*, p. 75 ; emphasis added.)

89. In the *Certain Norwegian Loans* case, as we have already indicated in paragraphs 62–65 of this opinion, France sought to found the jurisdiction of the Court upon the optional clause declarations alone; and she invoked the 1928 Act, together with an Arbitration Convention of 1904 and Hague Convention No. II of 1907, for the purpose of establishing that Norway was subject to an obligation to submit the matters in dispute to arbitration. In that case, therefore, the issue of the relation between the respective jurisdictional obligations of the Parties under the optional clause and under treaties did not arise with reference to the Court's own jurisdiction. It was raised, however, by France herself in the context of the relation between the obligations of the Parties to accept compulsory jurisdiction under the optional clause and their obligations compulsorily to accept arbitration under the three treaties. Moreover, in this context the temporal relation between the acceptances of jurisdiction under the optional clause and under the treaties was the same as in the present case, the three treaties all antedating the Parties' declarations under the optional clause. In its observations on Norway's preliminary objections, after referring to the General Act of 1928 and the other two treaties, the French Government invoked with every apparent approval the

pronouncement of the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case that:

“... the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the result that no jurisdiction would remain”.

Again at the oral hearing of 14 May 1957, after referring specifically to Article 17 of the 1928 Act, the French Government said:

“Pour que, de cette multiplicité d'engagements d'arbitrage et de juridiction, découle l'incompétence de la Cour, malgré la règle contraire de l'arrêt *Compagnie d'Electricité de Sofia*, il faudrait que la Cour estime qu'il n'y a aucun différend d'ordre juridique ...” (**I.C.J. Pleadings, Certain Norwegian Loans**, Vol. II, at pp. 60–61 ; emphasis added.)

And in its oral reply—this time in connection with Hague Convention No. II of 1907—the French Government yet again reminded the Court of that passage in the Judgment in the *Electricity Company of Sofia and Bulgaria* case (*ibid.*, at p. 197).

90. The Court, in the *Certain Norwegian Loans* case, for the reasons which have already been recalled, found it unnecessary to deal with this question. Judge Basdevant, on the other hand, did refer to it and his observations touch very directly the issue raised by the French Government in the present case. Having pointed out that the French declaration under the optional clause limited “the sphere of compulsory jurisdiction more than did the General Act in relations between France and Norway”, Judge Basdevant observed:

“Now, it is clear that this unilateral Declaration by the French Government could not modify, in this limitative sense, the law that was then in force between France and Norway.

In a case in which it had been contended that not a unilateral declaration but a treaty between two States had limited the scope as between them of their previous declarations accepting compulsory jurisdiction, the Permanent Court rejected this contention ...” (**I.C.J. Reports 1957**, p. 75.)

He then quoted the passage from the *Electricity Company of Sofia and Bulgaria* case about “multiplicity of agreements” and proceeded to apply it to the *Certain Norwegian Loans* case as follows :

“A way of access to the Court was opened up by the accession of the two Parties to the General Act of 1928. It could not be closed or cancelled out by the restrictive clause which the French Government, and not the Norwegian Government, added to its fresh acceptance of compulsory jurisdiction stated in its Declaration of 1949. *This restrictive clause, emanating from only one of them, does not constitute the law as between France and Norway. The clause is not sufficient to set aside the juridical system existing between them on this point.* It cannot close the way of access to the Court that was formerly open, or cancel it out with the result that no jurisdiction would remain.” (**I.C.J. Reports 1957**, pp. 75 and 76 ; emphasis added.)

It is difficult to imagine a more forcible rejection of the thesis that a unilateral declaration may modify the terms on which compulsory jurisdiction has been accepted under an earlier treaty than that of Judge Basdevant on the *Certain Norwegian Loans* case.

91. The issue did arise directly with reference to the Court's jurisdiction in the *Appeal Relating to the Jurisdiction of the ICAO Council* case (**I.C.J. Reports 1972**, p. 46), where India in her Application had founded the jurisdiction of the Court on certain provisions of the Convention on International Civil Aviation and of the International Air Services Transit Agreement, together with

Articles 36 and 37 of the Statute of the Court. Pakistan, in addition to raising certain preliminary objections to jurisdiction on the basis of provisions in the treaties themselves, had argued that the Court must in any event hold itself to lack jurisdiction by reason of the effect of one of India's reservations to her acceptance of compulsory jurisdiction under the optional clause (*ibid.*, p. 53, and **I.C.J.** *Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council*, p. 379). In short, Pakistan had specifically advanced in that case the very argument now put forward by the French Government in the Annex to its letter of 16 May 1973. Furthermore, India's declaration containing the reservation in question had been made subsequently to the conclusion of the two treaties, so that the case was on all fours with the present case. The Court, the Judgment shows, dealt with the treaties and the optional clause declarations as two separate and wholly independent sources of jurisdiction. Speaking, *inter alia*, of Pakistan's reliance on the reservation in India's declaration, the Court observed:

"In any event, such matters would become material only if it should appear that the Treaties and their jurisdictional clauses did not suffice, and that the Court's jurisdiction must be sought outside them, which, for reasons now to be stated, the Court does not find to be the case." (**I.C.J.** *Reports 1972*, p. 53.)

Having then stated these reasons, which were that the Court rejected Pakistan's preliminary objections relating to the jurisdictional clauses of the Treaties and upheld its jurisdiction under those clauses, the Court summarily disposed of the objection based on the reservation in India's declaration :

"Since therefore the Court is invested with jurisdiction under those clauses and, in consequence ... under Article 36, paragraph 1, and under Article 37, of its Statute, *it becomes irrelevant to consider the objections to other possible bases of jurisdiction.*" (*ibid.*, p. 60; emphasis added.)

Thus the Court expressly held the reservation in India's subsequent declaration under the optional clause to be of no relevance whatever in determining the Court's jurisdiction under the earlier treaties.

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Australia's Alleged Breach of the 1928 Act in 1939

92. Finally, one further argument put forward in the Annex to the letter of 16 May 1973 for considering the 1928 Act inapplicable between France and Australia needs to be mentioned. In connection with another contention of the French Government, we have already referred to the notification addressed by Australia to the Secretary-General of the League of Nations four days after the outbreak of the Second World War to the effect that she would not regard her accession to the Act as "covering or relating to any dispute arising out of events occurring during present crisis" (para. 27). The further argument now requiring our attention is that this notification was not in accord with the provision in Article 45 concerning modification of reservations; that Australia refrained from regularizing her position with regard to this provision when it could have done so in 1944; and that, although France never protested against the supposed breach of the Act, the French Government is not bound to respect a treaty which Australia herself has "ceased to respect since a date now long past". We have already pointed out that Australia, as also Canada, justified her notification of the new reservation on the basis of the breakdown of collective security under the League and the resulting fundamental change in the situation obtaining when she acceded to the Act, and that if that justification was well founded, there was no pressing need to "regularize" her position under the Act in 1944. Reference to the historical context in which the Australian notification was made shows also that this further argument lacks all plausibility.

93. In February 1939 France, the United Kingdom, India and New Zealand each notified the

Secretary-General of their reservation from the 1928 Act of “disputes arising out of any war in which they might be engaged”. These notifications were all made expressly under Article 45 of the Act, and were accompanied by explanations referring to the withdrawal of some Members of the League and the reinterpretation by others of their collective security obligations. Having regard to the similarity of the terms of the four notifications and the fact that they were deposited almost simultaneously (on 14 and 15 February 1939), it seems evident that the four States acted together. Similar action was not, however, taken by either Australia or Canada with reference to the 1928 Act at that date.

Conclusions on the Question of Jurisdiction

94. In our view, therefore, close examination of the various objections to the Court's assuming jurisdiction on the basis of the General Act of 1928, which are developed in the French Government's letter and Annex of 16 May 1973, show them all to be without any sound foundation. Nor has our own examination of the matter, *proprio motu*, revealed any other objection calling for consideration. We accordingly conclude that Article 17 of the 1928 Act provides in itself a valid and sufficient basis for the Applicant to establish the jurisdiction of the Court in the present case.

95. It follows that, as was said by the Court in the *Appeal Relating to the Jurisdiction of the ICAO Council* case, “it becomes irrelevant to consider the objections to other possible bases of jurisdiction”. We do not, therefore, find it necessary to examine the alternative basis of jurisdiction invoked by the Applicant, i.e., the two declarations of the Parties under the optional clause, or any problems which the reservations to those declarations may raise.

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Part III. The Requirements of Article 17 of the 1928 Act and the Admissibility of the Application

96. In our view, it is clear that there are no grounds on which the Applicant's claim might be considered inadmissible. The extent to which any such proposed grounds are linked to the jurisdictional issue or are considered apart from that issue will be developed in this part of our opinion. At the outset we affirm that there is nothing in the concept of admissibility which should have precluded the Applicant from being given the opportunity of proceeding to the merits. This observation applies, in particular, to the contention that the claim of the Applicant reveals no legal dispute or, put differently, that the dispute is exclusively of a political character and thus non-justiciable.

97. Under the terms of Article 17 of the 1928 Act, the jurisdiction which it confers on the Court is over “all disputes with regard to which the parties are in conflict as to their respective rights” (subject, of course, to any reservations made under Article 39 of the Act). Article 17 goes on to provide: “It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court...” The disputes “mentioned in Article 36 of the Statute of the Permanent Court” are the four classes of legal disputes listed in the optional clause of that Statute and of the present Statute. Moreover, subject to one possible point which does not arise in the present case ¹, it is generally accepted that these four classes of “legal disputes” and the earlier expression in Article 17 “all disputes with regard to which the parties are in conflict as to their respective rights” have to all intents and purposes the same scope. It follows that what is a dispute “with regard to which the parties are in conflict as to their respective rights” will also be a dispute which falls within one of the four categories of legal disputes mentioned in the optional clause and vice versa.

98. In the present proceedings, Australia has described the subject of the dispute in paragraphs 2–20 of her Application. *Inter alia*, she there states that in a series of diplomatic Notes beginning in 1963 she repeatedly voiced to the French Government her opposition to France's conduct of

atmospheric **nuclear tests** in the South Pacific region ; and she identifies the legal dispute as having taken shape in diplomatic Notes of 3 January, 7 February and 13 February 1973 which she annexed to her Application. In the first of these three Notes, the Australian Government made clear its opinion that the conducting of such **tests** would :

“... be unlawful-particularly in so far as it involves modification of the physical conditions of and over Australian territory ; pollution of the atmosphere and of the resources of the seas ; interference with freedom of navigation both on the high seas and in the airspace above; and infraction of legal norms concerning atmospheric **testing** of **nuclear** weapons”.

This opinion was challenged by the French Government in its reply of 7 February 1973, in which it expressed its conviction that “its **nuclear** experiments have not violated any rule of international law” and controverted Australia's legal contentions point by point. In a further Note of 13 February, however, the Australian Government expressed its disagreement with the French Government's views, repeated its opinion that the conducting of the **tests** violates rules of international law, and said it was clear that “in this regard there exists between our two Governments a substantial legal dispute”. Then, after extensive observations on the consequences of **nuclear** explosions, the growth of the awareness of the danger of **nuclear testing** and of the particular aspects and specific consequences of the French **tests** , Australia set out seriatim, in paragraph 49 of her Application, three separate categories of Australia's rights which she contends have been, are, and will be violated by the French atmospheric **tests** .

99. Prima facie, it is difficult to imagine a dispute which in its subjectmatter and in its formulation is more clearly a “legal dispute” than the one submitted to the Court in the Application. The French Government itself does not seem in the diplomatic exchanges to have challenged the Australian Government's characterization of the dispute as a “substantial legal dispute”, even although in the above-mentioned Note of 7 February 1973 it expressed a certain scepticism regarding the legal considerations invoked by Australia. Moreover, neither in its letter of 16 May 1973 addressed to the Court nor in the Annex enclosed with that letter did the French Government for a moment suggest that the dispute is not a dispute “with regard to which the parties are in conflict as to their respective rights” or that it is not a “legal dispute”. Although in that letter and Annex, the French Government advanced a whole series of arguments for the purpose of justifying its contention that the jurisdiction of the Court cannot be founded in the present case on the General Act of 1928, it did not question the character of the dispute as a “legal dispute” for the purposes of Article 17 of the Act.

100. In the *Livre blanc sur les expériences nucléaires* published in June 1973, however, the French Government did take the stand that the dispute is not a legal dispute. Chapter II, entitled “Questions juridiques” concludes with a section on the question of the Court's jurisdiction, the final paragraph of which reads:

“La Cour n'est pas compétente, enfin, parce que l'affaire qui lui est soumise n'est pas fondamentalement un différend d'ordre juridique. Elle se trouve, en fait et par divers biais, invitée à prendre position sur un problème purement politique et militaire. Ce n'est, selon le Gouvernement français, ni son rôle ni sa vocation.” (P. 23.)

This clearly is an assertion that the dispute is one concerned with matters other than legal and, therefore, not justiciable by the Court.

101. Complying with the Court's Order of 22 June 1973, Australia submitted her observations on the questions of the jurisdiction of the Court and the admissibility of the Application. Under the rubric of “jurisdiction” she expressed her views, *inter alia*, on the question of the political or legal nature of the dispute ; and under the rubric of “admissibility” she furnished further explanations of the three categories of rights which she claims to be violated by France's conduct of **nuclear** atmospheric **tests** in the South Pacific region. These rights, as set out in paragraph 49 of the

Application and developed in her pleadings, may be broadly described as follows :

(1) A right said to be possessed by every State, including Australia, to be free from atmospheric **nuclear** weapon **tests**, conducted by any State, in virtue of what Australia maintains is now a generally accepted rule of customary international law prohibiting all such **tests**. As support for the alleged right, the Australian Government invoked a variety of considerations, including the development from 1955 onwards of a public opinion strongly opposed to atmospheric **tests**, the conclusion of the Moscow **Test** Ban Treaty in 1963, the fact that some 106 States have since become parties to that Treaty, diplomatic and other expressions of protests by numerous States in regard to atmospheric **tests**, rejected resolutions of the General Assembly condemning such **tests** as well as pronouncements of the Stockholm Conference on the Human Environment, Articles 55 and 56 of the Charter, provisions of the Universal Declaration of Human Rights and of the International Covenant on Economic, Social and Cultural Rights and other pronouncements on human rights in relation to the environment.

(2) A right, said to be inherent in Australia's own territorial sovereignty, to be free from the deposit on her territory and dispersion in her air space, without her consent, of radio-active fall-out from the French **nuclear tests**. The mere fact of the trespass of the fall-out, the harmful effects which flow from such fall-out and the impairment of her independent right to determine what acts shall take place within her territory (which she terms her "decisional sovereignty") all constitute, she maintains, violations of this right. As support for this alleged right, the Australian Government invoked a variety of legal material, including pronouncements of this Court in the *Corfu Channel* case (**I.C.J. Reports 1949**, at pp. 22 and 35), of Mr. Huber in the *Island of Palmas Arbitration* (*UNRIAA*, Vol. II, p. 839) and of the Permanent Court of International Justice in the *Customs Union* case (*P.C.I.J., Series A/B, No. 41*, at p. 39), the General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation, the Charter of the Organization of African Unity, and Declarations of the General Assembly and of Unesco regarding satellite broadcasting, and opinions of writers.

(3) A right, said to be derived from the character of the high seas as *res communis* and to be possessed by Australia in common with all other maritime States, to have the freedoms of the high seas respected by France ; and, in particular, to require her to refrain from (a) interference with the ships and aircraft of other States on the high seas and in the superjacent air space, and (b) the pollution of the high seas by radio-active fall-out. As support for this alleged right, the Australian Government referred to Articles 2 and 25 of the Geneva Convention of 1958 on the High Seas, the commentaries of the International Law Commission on the corresponding provisions of its draft Articles on the Law of the Sea and to other legal material, including the records of the debates in the International Law Commission, passages in this Court's Judgment in the *Anglo-Norwegian Fisheries* case, various declarations and treaty provisions relating to marine pollution, and opinions of writers.

In response to a question put by a Member of the Court, the Australian Government also furnished certain explanations regarding (i) the distinction which it draws between the transmission of chemical or other matter from one State's territory to that of another as a result of a normal and natural use of the former's territory and one which does not result from a normal and natural use ; and (ii) the relevance or otherwise of harm or potential harm as an element in the legal cause of action in such cases.

102. In regard to each of the above-mentioned categories of legal rights, Australia maintained that there is a correlative legal obligation resting upon France, the breach of which would involve the latter in international responsibility towards Australia. In addition, she developed a general argument by which she sought to engage the international responsibility of France on the basis of

the doctrine of “abuse of rights” in the event that France should be considered as, in principle, invested with a right to carry out atmospheric **nuclear tests**. In this connection, she referred to a dictum of Judge Alvarez in the *Anglo-Iranian Oil Co. case*, the Report of the Asian-African Legal Consultative Committee in 1964 on the Legality of **Nuclear Tests**, Article 74 of the Charter, the opinions of certain jurists and other legal materials.

103. Under the rubric of “admissibility”, Australia also presented her views on the question, mentioned in paragraph 23 of the Order of 22 June 1973, of her “legal interest” in respect of the claims put forward in her Application. She commented, in particular, on the question whether, in the case of a right possessed by the international community as a whole, an individual State, independently of material damage to itself, is entitled to seek the respect of that right by another State. She maintained in regard to certain categories of obligations owed *erga omnes* that every State may have a legal interest in their performance, citing certain pronouncements of the Permanent Court and of this Court and more especially the pronouncement of this Court on the matter in the *Barcelona Traction Light and Power Company case (Second Phase, I.C.J. Reports 1970, at p. 32)*. With regard to the right said to be inherent in Australia's own territorial sovereignty, she considered it obvious that a State possesses a legal interest “in the protection of its territory from any form of external harmful action as well as in the defence of the well-being of its population and in the protection of national integrity and independence”. With regard to the right said to be derived from the character of the high seas as *res communis*, Australia maintained that “every State has a legal interest in safeguarding the respect by other States of the freedom of the seas”, that the practice of States demonstrates the irrelevance of the possession of a specific material interest on the part of the individual State, and that this general legal interest of all States in safeguarding the freedom of the seas has received express recognition in connection with **nuclear tests**. As support for the above proposition she cited a variety of legal material.

* * *

104. In giving this very summary account of the legal contentions of the Australian Government, we are not to be taken to express any view as to whether any of them are well or ill founded. We give it for the sole purpose of indicating the context in which Article 17 of the 1928 Act has to be applied and the admissibility of Australia's Application determined. Before we draw any conclusions, however, from that account of Australia's legal contentions, we must also indicate our understanding of the principles which should govern our determination of these matters at the present stage of the proceedings.

* *

105. The matters raised by the issues of “legal or political dispute” and “legal interest”, although intrinsically matters of admissibility, are at the same time matters which, under the terms of Article 17 of the 1928 Act, also go to the Court's jurisdiction in the present case. Accordingly, it would be pointless for us to characterize any particular issue as one of jurisdiction or of admissibility, more especially as the practice neither of the Permanent Court nor of this Court supports the drawing of a sharp distinction between preliminary objections to jurisdiction and admissibility. In the Court's practice the emphasis has been laid on the essentially preliminary or non-preliminary character of the particular objection rather than on its classification as a matter of jurisdiction or admissibility (cf. Art. 62 of the Rules of the Permanent Court, Art. 62 of the old Rules of this Court and Art. 67 of the new Rules). This is because, owing to the consensual nature of the jurisdiction of an international tribunal, an objection to jurisdiction no less than an objection to admissibility may involve matters which relate to the merits; and then the critical question is whether the objection can or cannot properly be decided in the preliminary proceedings without pleadings affording the parties the opportunity to plead to the merits. The answer to this question necessarily depends on whether the objection is genuinely of a preliminary character or whether it is too closely linked to the merits to be susceptible of a just decision without first having pleadings on the merits. So it is that, in

specifying the task of the Court when disposing of preliminary objections, Article 67, paragraph 7, of the Rules expressly provides, as one possibility, that the Court should “declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character”. These principles clearly apply in the present case even although, owing to the absence of France from the proceedings, the issues of jurisdiction and admissibility now before the Court have not been raised in the form of objections *stricto sensu*.

106. The French Government's assertion that the dispute is not fundamentally of a legal character and concerns a purely political and military question is, in essence, a contention that it is not a dispute in which the Parties are in conflict as to their legal rights ; or that it does not fall within the categories of legal disputes mentioned in Article 36 (2) of the Statute. Or, again, the assertion may be viewed as a contention that international law imposes no legal obligations upon France in regard to the matters in dispute which, therefore, are to be considered as matters left by international law exclusively within her national jurisdiction ; or, more simply, as a contention that France's **nuclear** experiments do not violate any existing rule of international law, as the point was put by the French Government in its diplomatic Note to the Australian Government of 7 February 1973. Yet, however the contention is framed, it is manifestly and directly related to the legal merits of the Applicant's case. Indeed, in whatever way it is framed, such a contention, as was said of similar pleas by the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case, “forms a part of the actual merits of the dispute” and “amounts not only to encroaching on the merits, but to coming to a decision in regard to one of the fundamental factors of the case” (*P.C.I.J., Series A/B, No. 77*, at pp. 78 and 82–83). In principle, therefore, such a contention cannot be considered as raising a truly preliminary question.

107. We say “in principle” because we recognize that, if an applicant were to dress up as a legal claim a case which to any informed legal mind could not be said to have any rational, that is, reasonably arguable, legal basis, an objection contesting the legal character of the dispute might be susceptible of decision *in limine* as a preliminary question. This means that in the preliminary phase of proceedings, the Court may have to make a summary survey of the merits to the extent necessary to satisfy itself that the case discloses claims that are reasonably arguable or issues that are reasonably contestable; in other words, that these claims or issues are rationally grounded on one or more principles of law, the application of which may resolve the dispute. The essence of this preliminary survey of the merits is that the question of jurisdiction or admissibility under consideration is to be determined not on the basis of whether the applicant's claim is right but exclusively on the basis whether it discloses a right to have the claim adjudicated. An indication of the merits of the applicant's case may be necessary to disclose the rational and arguable character of the claim. But neither such a preliminary indication of the merits nor any finding of jurisdiction or admissibility made upon it may be taken to prejudge the merits. It is for this reason that, in investigating the merits for the purpose of deciding preliminary issues, the Court has always been careful to draw the line at the point where the investigation may begin to encroach upon the decision of the merits. This applies to disputed questions of law no less than to disputed questions of fact ; the maxim *jura novit curia* does not mean that the Court may adjudicate on points of law in a case without hearing the legal arguments of the parties.

108. The precise **test** to be applied may not be easy to state in a single combination of words. But the consistent jurisprudence of the Permanent Court and of this Court seems to us clearly to show that, the moment a preliminary survey of the merits indicates that issues raised in preliminary proceedings cannot be determined without encroaching upon and prejudging the merits, they are not issues which may be decided without first having pleadings on the merits (cf. *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, P.C.I.J., Series B, No. 4; Right of Passage over Indian Territory* case, **I.C.J.** Reports 1957, at pp. 133–134 ; the *Interhandel* case, **I.C.J.** Reports 1959, pp. 23–25). We take as our general guide the observations of this Court in the *Interhandel* case when rejecting a plea of domestic jurisdiction which had been raised as a preliminary objection :

“In order to determine whether the examination of the grounds thus invoked is excluded from the jurisdiction of the Court for the reason alleged by the United States, the Court will base itself on the course followed by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees Issued in Tunis and Morocco* (Series B, No. 4), when dealing with a similar divergence of view. Accordingly, the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Government or to give an opinion on their interpretation, since that would be to enter upon the merits of the dispute. The Court will confine itself to considering *whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and if so, whether questions relating to the validity and interpretation of those grounds are questions of international law.*” (Emphasis added.)

In the *Interhandel* case, after a summary consideration of the grounds invoked by Switzerland, the Court concluded that they both involved questions of international law and therefore declined to entertain the preliminary objection.

109. The summary account which we have given above of the grounds invoked by Australia in support of her claims appears to us amply sufficient, in the language of the Court in the *Interhandel* case, “to justify the provisional conclusion that they may be of relevance in this case” and that “questions relating to the validity and interpretation of those grounds are questions of international law”. It is not for us “to assess the validity of those grounds” at the present stage of the proceedings since that would be to “enter upon the merits of the dispute”. But our summary examination of them satisfies us that they cannot fairly be regarded as frivolous or vexatious or as a mere attorney’s mantle artfully displayed to cover an essentially political dispute. On the contrary, the claims submitted to the Court in the present case and the legal contentions advanced in support of them appear to us to be based on rational and reasonably arguable grounds. Those claims and legal contentions are rejected by the French Government on legal grounds. In our view, these circumstances in themselves suffice to qualify the present dispute as a “dispute in regard to which the parties are in conflict as to their legal rights” and as a “legal dispute” within the meaning of Article 17 of the 1928 Act.

110. The conclusion just stated conforms to what we believe to be the accepted view of the distinction between disputes as to rights and disputes as to so-called conflicts of interests. According to that view, a dispute is political, and therefore non-justiciable, where the claim is demonstrably rested on other than legal considerations, e.g., on political, economic or military considerations. In such disputes one, at least, of the parties is not content to demand its legal rights, but asks for the satisfaction of some interest of its own even although this may require a change in the legal situation existing between them. In the present case, however, the Applicant invokes legal rights and does not merely pursue its political interest ; it expressly asks the Court to determine and apply what it contends are existing rules of international law. In short, it asks for the settlement of the dispute “on the basis of respect for law”, which is the very hall-mark of a request for judicial, not political settlement of an international dispute (cf. *Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne, P.C.I.J., Series B, No. 12, p. 26*). France also, in contesting the Applicant’s claims, is not merely invoking its vital political or military interests but is alleging that the rules of international law invoked by the Applicant do not exist or do not warrant the import given to them by the Applicant. The attitudes of the Parties with reference to the dispute, therefore, appear to us to show conclusively its character as a “legal” and justiciable dispute.

111. This conclusion cannot, in our view, be affected by any suggestion or supposition that, in bringing the case to the Court, the Applicant may have been activated by political motives or considerations. Few indeed would be the cases justiciable before the Court if a legal dispute were to be regarded as deprived of its legal character by reason of one or both parties being also influenced by political considerations. Neither in contentious cases nor in requests for advisory

opinions has the Permanent Court or this Court ever at any time admitted the idea that an intrinsically legal issue could lose its legal character by reason of political considerations surrounding it.

112. Nor is our conclusion in any way affected by the suggestion that in the present case the Court, in order to give effect to Australia's claims, would have to modify rather than apply the existing law. Quite apart from the fact that the Applicant explicitly asks the Court to apply the existing law, it does not seem to us that the Court is here called upon to do anything other than exercise its normal function of deciding the dispute by applying the law in accordance with the express directions given to the Court in Article 38 of the Statute. We fully recognize that, as was emphasized by the Court recently in the *Fisheries Jurisdiction* cases, "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" (*I.C.J. Reports 1974*, at pp. 23–24 and 192). That pronouncement was, however, made only after full consideration of the merits in those cases. It can in no way mean that the Court should determine in *limine litis* the character, as *lex lata* or *lex ferenda*, of an alleged rule of customary law and adjudicate upon its existence or non-existence in preliminary proceedings without having first afforded the parties the opportunity to plead the legal merits of the case. In the present case, the Court is asked to perform its perfectly normal function of assessing the various elements of State practice and legal opinion adduced by the Applicant as indicating the development of a rule of customary law. This function the Court performed in the *Fisheries Jurisdiction* cases, and if in the present case the Court had proceeded to the merits and upheld the Applicant's contentions in the present case, it could only have done so on the basis that the alleged rule had indeed acquired the character of *lex lata*.

113. Quite apart from these fundamental considerations, we cannot fail to observe that, in alleging violations of its territorial sovereignty and of rights derived from the principle of the freedom of the high seas, the Applicant also rests its case on long-established-indeed elemental- rights, the character of which as *lex lata* is beyond question. In regard to these rights the task which the Court is called upon to perform is that of determining their scope and limits vis-à-vis the rights of other States, a task inherent in the function entrusted to the Court by Article 38 of the Statute.

114. These observations also apply to the suggestion that the Applicant is in no position to claim the existence of a rule of customary international law operative against France inasmuch as the Applicant did not object to, and even actively assisted in, the conduct of atmospheric **nuclear tests** in the Pacific Ocean region prior to 1963. Clearly this is a matter involving the whole concept of the evolutionary character of customary international law upon which the Court should not pronounce in these preliminary proceedings. The very basis of the Applicant's legal position, as presented to the Court, is that in connection with and after the **tests** in question there developed a growing awareness of the dangers of **nuclear** fall-out and a climate of public opinion strongly opposed to atmospheric **tests**; and that the conclusion of the Moscow **Test Ban Treaty** in 1963 led to the development of a rule of customary law prohibiting such **tests**. The Applicant has also drawn attention to its own constant opposition to atmospheric **tests** from 1963 onwards. Consequently, although the earlier conduct of the Applicant is no doubt one of the elements which would have had to be taken into account by the Court, it would have been upon the evidence of State practice as a whole that the Court would have had to make its determination of the existence or non-existence of the alleged rule. In short, however relevant, this point appears to us to belong essentially to the legal merits of the case, and not to be one appropriate for determination in the present preliminary proceedings.

115. We are also unable to see how the fact that there is a sharp conflict of view between the Applicant and the French Government concerning the materiality of the damage or potential risk of damage resulting from **nuclear** fall-out could either affect the legal character of the dispute or call for the Application to be adjudged inadmissible here and now. This question again appears to us to belong to the stage of the merits. On the one side, the Australian Government has given its account

of “ **nuclear** explosions and their consequences” in paragraphs 22–39 of the Application and, in dealing with the growth of international concern on this matter, has cited a series of General Assembly resolutions, the establishment of UNSCEAR in 1955 and its subsequent reports on atomic radiation, the **Test** Ban Treaty itself, the Treaty for the Prohibition of **Nuclear** Weapons in Latin America, and declarations and resolutions of South Pacific States, Latin American States, African and Asian States, and a resolution of the Twenty-sixth Assembly of the World Health Organization. It has also referred to the psychological injury said to be caused to the Australian people through their anxiety as to the possible effects of radio-active fall-out on the well-being of themselves and their descendants. On the other side, there are before the Court the repeated assurances of the French Government, in diplomatic Notes and public statements, concerning the precautions taken by her to ensure that the **nuclear tests** would be carried out “in complete security”. There are also reports of various scientific bodies, including those of the Australian National Radiation Advisory Committee in 1967, 1969, 1971 and 1972 and of the New Zealand National Radiation Laboratory in 1972, which all concluded that the radio-active fall-out from the French **tests** was below the damage level for public health purposes. In addition, the Court has before it the report of a meeting of Australian and French scientists in May 1973 in which they arrived at common conclusions as to the data of the amount of fall-out but differed as to the interpretation of the data in terms of the biological risks involved. Whatever impressions may be gained from a prima facie reading of the evidence so far presented to the Court, the questions of the materiality of the damage resulting from, and of the risk of future damage from, atmospheric **nuclear tests**, appear to us manifestly questions which cannot be resolved in preliminary proceedings without the parties having had the opportunity to submit their full case to the Court.

116. The dispute as to the facts regarding damage and potential damage from radio-active **nuclear** fall-out itself appears to us to be a matter which falls squarely within the third of the categories of legal disputes listed in Article 36 (2) of the Statute : namely a dispute concerning “the existence of any fact which, if established, would constitute a breach of an international obligation”. Such a dispute, in our view, is inextricably linked to the merits of the case. Moreover, Australia in any event contends, in respect of each one of the rights which she invokes, that the right is violated by France's conduct of atmospheric **tests** independently of proof of damage suffered by Australia. Thus, the whole issue of material damage appears to be inextricably linked to the merits. Just as the question whether there exists any general rule of international law prohibiting atmospheric **tests** is “a question of international law” and part of the legal merits of the case, so also is the point whether material damage is an essential element in that alleged rule. Similarly, just as the questions whether there exist any general rules of international law applicable to invasion of territorial sovereignty by deposit of **nuclear** fall-out and regarding violation of so-called “decisional sovereignty” by such a deposit are “questions of international law” and part of the legal merits, so also is the point whether material damage is an essential element in any such alleged rules. *Mutatis mutandis*, the same may be said of the question whether a State claiming in respect of an alleged violation of the freedom of the seas has to adduce material damage to its own interests.

117. Finally, we turn to the question of Australia's legal interest in respect of the claims which she advances. With regard to the right said to be inherent in Australia's territorial sovereignty, we think that she is justified in considering that her legal interest in the defence of that right is self-evident. Whether or not she can succeed in persuading the Court that the particular right which she claims falls within the scope of the principle of territorial sovereignty, she clearly has a legal interest to litigate that issue in defence of her territorial sovereignty. With regard to the right to be free from atmospheric **tests**, said to be possessed by Australia in common with other States, the question of “legal interest” again appears to us to be part of the general legal merits of the case. If the materials adduced by Australia were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric **nuclear tests**, the Court would at the same time have to determine what is the precise character and content of that rule and, in particular, whether it

confers a right on every State individually to prosecute a claim to secure respect for the rule. In short, the question of “legal interest” cannot be separated from the substantive legal issue of the existence and scope of the alleged rule of customary international law. Although we recognize that the existence of a so-called *actio popularis* in international law is a matter of controversy, the observations of this Court in the *Barcelona Traction, Light and Power Company, Limited* case¹ suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court.

118. As to the right said to be derived from the principle of the freedom of the high seas, the question of “legal interest” once more appears clearly to belong to the general legal merits of the case. Here, the existence of the fundamental rule, the freedom of the high seas, is not in doubt, finding authoritative expression in Article 2 of the Geneva Convention of 1958 on the High Seas. The issues disputed between the Parties under this head are (i) whether the establishment of a **nuclear** weapon- **testing** zone covering areas of the high seas and the superjacent air space are permissible under that rule or are violations of the freedoms of navigation and fishing, and (ii) whether atmospheric **nuclear tests** also themselves constitute violations of the freedom of the seas by reason of the pollution of the waters alleged to result from the deposit of radio-active fall-out. In regard to these issues, the Applicant contends that it not only has a general and common interest as a user of the high seas but also that its geographical position gives it a special interest in freedom of navigation, over-flight and fishing in the South Pacific region. That States have individual as well as common rights with respect to the freedoms of the high seas is implicit in the very concept of such freedoms which involve rights of user possessed by every State, as is implicit in numerous provisions of the Geneva Convention of 1958 on the High Seas. It is, indeed, evidenced by the long history of international disputes arising from conflicting assertions of their rights on the high seas by individual States. Consequently, it seems to us that it would be difficult to admit that the Applicant in the present case is not entitled even to litigate the question whether it has a legal interest individually to institute proceedings in respect of what she alleges to be violations of the freedoms of navigation, over-flight and fishing. This question, as we have indicated, is an integral part of the substantive legal issues raised under the head of the freedom of the seas and, in our view, could only be decided by the Court at the stage of the merits.

119. Having regard to the foregoing observations, we think it clear that none of the questions discussed in this part of our opinion would constitute a bar to the exercise of the Court's jurisdiction with respect to the merits of the case on the basis of Article 17 of the 1928 Act. Whether regarded as matters of jurisdiction or of admissibility, they are all either without substance or do “not possess, in the circumstances of the case, an exclusively preliminary character”. Dissenting, as we do, from the Court's decision that the claim of Australia no longer has any object, we consider that the Court should have now decided to proceed to pleadings on the merits.

Part IV. Conclusion

120. Since we are of the opinion that the Court has jurisdiction and that the case submitted to the Court discloses no ground on which Australia's claims should be considered inadmissible, we consider that the Applicant had a right under the Statute and the Rules to have the case adjudicated. This right the Judgment takes away from the Applicant by a procedure and by reasoning which, to our regret, we can only consider as lacking any justification in the Statute and Rules or in the practice and jurisprudence of the Court.

(Signed) Charles D. Onyeama.

(Signed) Hardy C. Dillard.

(Signed) E. Jiménez De Aréchaga.

(Signed) H. Waldock.

Dissenting Opinion of Judge de Castro

Judge de Castro

[Translation]

In its Order of 22 June 1973 the Court decided that the written pleadings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. The Court ought therefore to give a decision on these two preliminary questions.

Nevertheless, the majority of the Court has now decided not to broach them, because it considers, in view of the statements made by French authorities on various occasions concerning the cessation of atmospheric **nuclear tests**, that the dispute no longer has any object.

That may be described as a prudent course to follow, and very learned arguments have been put forward in support of it, but I am sorry to say that they fail to convince me. It is therefore, I feel, incumbent upon me to set out the reasons why I am unable to vote with the majority, and briefly to state how, in my view, the Court ought to have pronounced upon the questions specified in the above-mentioned Order.

I. Is the Dispute Now Without Object?

Attention should in my view be drawn to various points concerning the value to be attached to the French authorities' statements in relation to the course of the proceedings :

1. I think the Court has done well to take these statements into consideration. It is true they do not form part of the formal documentation brought to the cognizance of the Court, but some have been cited by the Applicant and others are matters of public knowledge ; to ignore them would be to shut one's eyes to conspicuous reality. Given the nonappearance of the Respondent, it is the duty of the Court to make sure *proprio motu* of every fact that might be significant for the decision by which it is to render justice in the case (Statute, Art. 53). In matters of procedure, the Court enjoys a latitude which is not to be found in the municipal law of States (*P.C.I.J., Series A, No. 2*, p. 34; Statute, Arts. 30 and 48).

As in the *Northern Cameroons* case, the Court may examine ex officio the questions whether it is or is not "impossible for the Court to render a judgment capable of effective application" (*I.C.J. Reports 1963*, p. 33), and whether the dispute submitted to it still exists-in other words, it may enquire whether, on account of a new fact, there is no longer any surviving dispute.

Thus, in the case brought before the Court, there arises a "pre-preliminary" question (separate opinion of Judge Sir Gerald Fitzmaurice, *ibid.*, p. 103) which must be given priority over any question of jurisdiction (*ibid.*, p. 105); namely whether the statements of the French authorities have removed the legal interest of the Application, and whether they may so be relied on as to render superfluous any judgment whereby the Court might uphold the Applicant's claims.

2. I am wholly aware that the vote of the majority can be viewed as a sign of prudence. The "new fact" which the statements of the French authorities represent is of an importance which should not be overlooked. They are clear, formal and repeated statements, which emanate from the highest authorities and show that those authorities seriously and deliberately intend henceforth to discontinue atmospheric **nuclear testing**. The French authorities are well aware of the anxiety aroused all over the world by the **tests** conducted in the South Pacific region and of the sense of relief produced by the announcement that they were going to cease and that underground **tests** would hereafter be carried out. These statements are of altogether special interest to the Applicant and to the Court.

It is true that the French Government has not appeared in the proceedings but, in point of fact, it

has, both directly and indirectly, made known to the Court its views on the case, and those views have been studied and taken into consideration in the Court's decisions. The French Government knows this. One must therefore suppose that the French authorities have been able to take account of the possible effect of their statements on the course of the proceedings.

It may be the confidence warranted by the statements of responsible authorities which explains why the majority of the Court has thought it desirable to terminate proceedings which it felt to be without object. An element of conflict (*lis*) is endemic in any litigation, which it seems only wise, *pro pace*, to regard as terminated as soon as possible ; this is moreover in line with the peacemaking function proper to an organ of the United Nations.

3. Even so, it must be added that the Court, as a judicial organ, must first and foremost have regard to the legal worth of the French authorities' statements.

Upon the Court there falls the task of interpreting their meaning and verifying their purpose. They can be viewed as the announcement of a programme, of an intention with regard to the future, their purpose being to enlighten all those who may be interested in the method which the French authorities propose to follow where **nuclear tests** are concerned. They can also be viewed as simple promises to conduct no more **nuclear tests** in the atmosphere. Finally, they can be considered as promises giving rise to a genuine legal obligation.

It is right to point out that there is not a world of difference between the expression of an intention to do or not do something in the future and a promise envisaged as a source of legal obligations. But the fact remains that not every statement of intent is a promise. There is a difference between a promise which gives rise to a moral obligation (even when reinforced by oath or word of honour) and a promise which legally binds the promiser. This distinction is universally prominent in municipal law and must be accorded even greater attention in international law.

For a promise to be legally binding on a State, it is necessary that the authorities from which it emanates should be competent so to bind the State (a question of internal constitutional law and international law) and that they should manifest the intention and will to bind the State (a question of interpretation). One has therefore to ask whether the French authorities which made the statements had the power, and were willing, to place the French State under obligation to renounce all possibility of resuming atmospheric **nuclear tests**, even in the event that such **tests** should again prove necessary for the sake of national defence : an obligation which, like any other obligation stemming from a unilateral statement, cannot be presumed and must be clearly manifested if it is to be reliable in law (*obligatio autem non oritur nisi ex voluntate certa et plane declarata*).

The identification of the necessary conditions to render a promise *animo sibi vinculandi* legally binding has always been a problem in municipal law and, since Grotius at least, in international law also. When an obligation arises whereby a person is bound to act, or refrain from acting, in such and such a way, this results in a restraint upon his freedom (*alienatio cuiusdam libertatis*) in favour of another, upon whom he confers a right in respect of his own conduct (*signum volendi lus proprium alteri conferri*); for that reason, and with the exception of those gratuitous acts which are recognized by the law (e.g., donation, *pollicitatio*), the law generally requires that there should be a *quid pro quo* from the beneficiary to the promiser. Hence—and this should not be forgotten—any promise (with the exception of *pollicitatio*) can be withdrawn at any time before its regular acceptance by the person to whom it is made (*ante acceptationem, quippe iure nondum translatum, revocari posse sine iniustitia*).

4. On the occasion of another unilateral statement—discontinuance—the Court established that an act of that kind must be considered in close relationship with the circumstances of the particular case (**I.C.J.** Reports 1964, p. 19). And it is with the circumstances of the present case in mind that one must seek an answer to the following questions :

Do those statements of the French authorities with which the Judgment is concerned mean anything other than the notification to the French people—or the world at large—of the **nuclear—test** policy which the Government will be following in the immediate future?

Do those statements contain a genuine promise never, in any circumstances, to carry out any more **nuclear tests** in the atmosphere?

Can those statements be said to embody the French Government's firm intention to bind itself to carry out no more **nuclear tests** in the atmosphere?

Do these same statements possess a legal force such as to debar the French State from changing its mind and following some other policy in the domain of **nuclear tests**, such as to place it vis-à-vis other States under an obligation to carry out no more **nuclear tests** in the atmosphere?

To these questions one may reply 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—and vis-à-vis whom, the whole world?

It appears to me that, to be able to declare that the dispute brought before it is without object, the Court requires to satisfy itself that, as a fact evident and beyond doubt, the French State wished to bind itself, and has legally bound itself, not to carry out any more **nuclear tests** in the atmosphere. Yet in my view the attitude of the French Government warrants rather the inference that it considers its statements on **nuclear tests** to belong to the political domain and to concern a question which, inasmuch as it relates to national defence, lies within the domain reserved to a State's domestic jurisdiction.

I perfectly understand the reluctance of the majority of the Court to countenance the protraction of proceedings which from the practical point of view have become apparently, or probably, pointless. It is however not only the probable, but also the possible, which has to be taken into account if rules of law are to be respected. It is thereby that the application of the law becomes a safeguard for the liberty of States and bestows the requisite security on international relations.

II. Jurisdiction of the Court

In its Order of 22 June 1973 the Court considered that the material submitted to it justified the conclusion that the provisions invoked by the Applicant appeared, *prima facie*, to afford a basis upon which the jurisdiction of the Court might be founded. At the present stage of the proceedings, the Court must satisfy itself that it has jurisdiction under Articles 36 and 37 of the Statute ¹.

1. Jurisdiction of the Court by Virtue of the French Government's Declaration of 20 May 1966 (Art. 36, para. 2, of the Statute)

The first objection to the jurisdiction of the Court is based on the reservation made by the French Government as to

“... disputes arising out of a war or international hostilities, disputes arising out of a crisis affecting national security or any measure or action relating thereto, and disputes concerning activities connected with national defence”.

This reservation certainly seems to apply to the **nuclear tests**. It is true that it has been contended that the **nuclear tests** do not fall within activities connected with national defence, because their object is the perfection of a weapon of mass destruction. But it must be borne in mind that we are dealing with a unilateral declaration, an optional declaration of adhesion to the jurisdiction of the Court. Thus the intention of the author of the declaration is the first thing to be

considered, and the terms of the declaration and the contemporary circumstances permit of this being ascertained. The term “national defence” is broad in meaning : “Ministry of National Defence” is commonly used as corresponding to “Ministry of the Armed Forces”. National defence also includes the possibility of riposting to the offensive of an enemy. This is the idea behind the “strike force”. The expression used (“concerning activities connected with ...”) rules out any restrictive interpretation. Furthermore, it is well known that the intention of the French Government was to cover the question of **nuclear tests** by this reservation ; it took care to modify reservation (3) to its declaration of 10 July 1959¹ six weeks before the first **nuclear test**².

The Applicant contends that the French reservation is void because it is subjective and automatic, and thus void as being incompatible with the requirements of the Statute. This argument is not convincing. In reservation (3) of the French declaration, it is neither stated explicitly nor implied that the French Government reserves the power to define what is connected with national defence. However that may be, if the reservation were void as contrary to law, the result would be that the declaration would be void, so that the source of the Court's jurisdiction under Article 36, paragraph 2, of the Statute would disappear along with the reservation. (In this sense, cf. separate opinion of Judge Sir Hersch Lauterpacht, **I.C.J. Reports 1957**, pp. 34 and 57–59; dissenting opinion of Judge Sir Hersch Lauterpacht, **I.C.J. Reports 1959**, p. 101; separate opinion of Judge Sir Percy Spender, **I.C.J. Reports 1959**, p. 59.) The reservation is not a statement of will which is independent and capable of being isolated. Partial nullity, which the Applicant proposes to apply to it, is only permissible when there is a number of terms which are entirely distinct (“*tot sunt stipulationes, quot corpora*”, D. 45, l, 1, para. 5) and not when the reservation is the “essential basis” of the consent (Vienna Convention on the Law of Treaties, Art. 44, para. 3 (b))¹.

The controversy is really an academic one. The exception or reservation in the French declaration states, in such a way as to exclude any possible doubt, that the French Government does not confer competence on the Court for disputes concerning activities connected with national defence. There is no possibility in law of the Court's jurisdiction being imposed on a State contrary to the clearly expressed will of that State. It is not possible to disregard both the letter and the spirit of Article 36 of the Statute and Article 2, paragraph 7, of the United Nations Charter.

2. Jurisdiction of the Court by Virtue of the General Act of Geneva of 26 September 1928 (Art. 36, para. 1, and Art. 37 of the Statute)

The question which most particularly requires to be examined is whether the General Act is still in force. Article 17 thereof reads as follows :

“All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.”

Article 37 of the Statute provides that :

“Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the Parties to the present Statute, be referred to the International Court of Justice.”

The French Government has informed the Court that it considers that the General Act cannot serve as a basis for the competence of the Court. It is therefore necessary to examine the various questions which have been raised as to the efficacy of the Act of Geneva after the dissolution of the League of Nations.

(a) The General Act, like the contemporary treaties for conciliation, judicial settlement and

arbitration, originated in the same concern for security and the same desire to ensure peace as underlay the system of the League of Nations. The question which arises in the present case is whether Article 17 of the General Act is no more than a repetition or duplication of Article 36, paragraph 2, of the Statute of the Permanent Court. If this is so, is Article 17 of the General Act subject to the vicissitudes undergone by Article 36, paragraph 2, of the Statute, and likewise to the reservations permitted by that provision?

The two Articles certainly coincide both in objects and means, but they are independent provisions which each have their own individual life. This appeared to be generally recognized. For brevity's sake, I will simply refer to the opinion of two French writers of indisputable authority. Gallus, in his study "L'Acte général a-t-il une réelle utilité?", reaches the above conclusion. He points out the similarities between the Articles, and goes on: "But it would not be correct to say that the General Act is no more than a confirmation of the system of Article 36 of the Statute of the Permanent Court of International Justice" (*Revue de droit international* (Lapradelle), Vol. III, 1931, p. 390). The author is also careful to point out the differences between the two sources of jurisdiction (members, conditions of membership, permitted reservations, duration, denunciation) and the complications caused by the co-existence of the two sources (*ibid.*, pp. 392–395). In his view, the General Act amounts to "a step further than the system of Article 36 of the Statute of the Court" (*ibid.*, p. 391).

In the same sense, René Cassin has said:

"Does the recent accession of France to the Protocol of the aforesaid Article 36 not duplicate its accession to Chapter II of the General Act of arbitration? The answer must be that it does not." ("L'Acte général d'arbitrage", *Questions politiques et juridiques, Affaires étrangères*, 1931, p. 17.)¹

(b) It has been said that the reservations contemplated by Article 39, paragraph 2 (b), of the General Act, applicable between the Governments which are Parties to this case, may be regarded as covering reservation (3) of the French declaration of 1966.

This view is not convincing. The reservation permitted by the General Act is for "disputes concerning questions which by international law are solely within the domestic jurisdiction of States". This coincides with reservation (2) in the French declaration of 1959, concerning "disputes relating to questions which by international law fall exclusively within the domestic jurisdiction". That reservation was retained (also as No. 2) in the French declaration of 1966; but it was thought necessary to add, in reservation (3), an exclusion relating to disputes concerning activities connected with national defence.

This addition to reservation (3) was necessary in order to modify its scope in view of the new circumstances created by the **nuclear tests**. The reserved domain of domestic jurisdiction does not include disputes arising from acts which might cause fall-out on foreign territory. The final phrase of reservation (3) of the French declaration of 1966 has an entirely new content, and one which therefore differs from Article 39, paragraph 2 (b), of the General Act.

(c) Paradoxically enough, doubt has been cast on the continuation in force of the General Act in the light of the proceedings leading up to General Assembly resolution 268A (III) on Restoration to the General Act of its Original Efficacy, and in view also of the actual terms of the resolution.

It is true that ambiguous expressions can be found in the records of the preliminary discussions. It was said that the draft resolution would not imply approval on the part of the General Assembly, and that it would thus confine itself to allowing the States to re-establish "the validity" of the General Act of 1928 of their own free will (Mr. Entezam of Iran, United

Nations, *Official Records of the Third Session of the General Assembly, Part I, Special Political Committee*, 26th Meeting, 6 December 1948, p. 302)¹. The spokesmen for the socialist republics, for their part, vigorously criticized the General Act for political reasons, regarding it as a worthless instrument that had brought forth stillborn measures.

But the signatories of the Act, when they spoke of regularizing and modifying the Act, were contemplating the restoration of its full original efficacy, and were not casting doubt on its existing validity. Mr. Larock (Belgium) explained that the General Act “was still valid, but needed to be brought up to date” (*ibid.*, 28th Meeting, p. 323). Mr. Ordonneau (France) stated that “the Interim Committee simply proposed practical measures designed to facilitate the application of provisions of Article 33 [of the Charter]” (*ibid.*, p. 324). Mr. Van Langenhove (Belgium) said that “the General Act of 1928 was still in force ; nevertheless its effectiveness had diminished since some of its machinery [i.e., machinery of the League of Nations] had disappeared” (United Nations, *Official Records of the Third Session of the General Assembly, Part II*, 198th Plenary Meeting, 28 April 1949, p. 176). Mr. Viteri Lafronte (Ecuador), the rapporteur, explained that “there was no question of reviving the Act of 1928 or of making adherence to it obligatory. The Act remained binding on those signatories that had not denounced it” (*ibid.*, p. 189). Mr. Lapie (France) also said that the General Act of 1928, which it was proposed “to restore to its original efficacy, was a valuable document inherited from the League of Nations and it had only to be brought into accordance with the new Organization” (*ibid.*, 199th Plenary Meeting, 28 April 1949, p. 193). To sum up, and without there being any need to burden this account of the matter with further quotations, it would seem that no-one at that time claimed the Act had ceased to exist as between its signatories, and that on the contrary it was recognized to be still in force between them.

Resolution 268A (III) of 28 April 1949, on the Restoration to the General Act of its Original Efficacy, gives a clear indication of what its object and purpose is. It considers that the Act was impaired by the fact that the organs of the League of Nations and the Permanent Court had disappeared, and that the amendments mentioned were of a nature to restore to it its original efficacy. The resolution emphasizes that such amendments

“will only apply as between the States having acceded to the General Act as thus amended and, as a consequence, will not affect the rights of such States, parties to the Act as established on 26 September 1928, as should claim to invoke it in so far as it might still be operative”.

(d) Are Articles 17, 33, 34 and 37 of the General Act, which refer to the Permanent Court of International Justice, still applicable by the operation of Article 37 of the Statute? Solely an affirmative answer would appear to be tenable.

The Court answered the question indirectly in the *Barcelona Traction, Light and Power Company, Limited* case (*Preliminary Objections* stage) ; Judge Armand-Ugon demonstrated that the bilateral treaties of conciliation, judicial settlement and arbitration of the time were of the same nature as the General Act, a multilateral treaty. He said of the Hispano-Belgian treaty of 1927 that it “is nothing other than a General Act on a small scale between two States”. That is true. He then reasoned as follows: resolution 268A (III) seemed to him to show, beyond all possible doubt, that the General Assembly did not think it could apply Article 37 of the Statute of the Court to the provisions of the General Act relating to the Permanent Court, because for such a transfer “a new agreement [the 1949 Act] was essential. This meant that Article 37 did not operate” (dissenting opinion, **I.C.J.** *Reports* 1964, p. 156). The Court did not accept Judge Armand-Ugon's reasoning as sound, and impliedly denied his interpretation of the 1949 Act and found Article 37 of the Statute applicable to the 1928 General Act¹. The doctrine of the Court was that the real object of the jurisdictional clause invoking the Permanent Court (under Art. 37) was not “to specify one

tribunal rather than another, but to create an obligation of compulsory adjudication” (**I.C.J.** Reports 1964, p. 38).

(e) The question which would appear to be basic to the present discussion on the continuance in force of the General Act is whether or not that instrument has been subjected to tacit abrogation.

International law does not look with favour on tacit abrogation of treaties. The Vienna Convention, which may be regarded as the codification of *communis opinio* in the field of treaties (**I.C.J.** Reports 1971, p. 47), has laid down that the “termination of a treaty” may take place only “as a result of the application of the provisions of the treaty or of the present Convention” (Art. 42, para. 2), and that the termination of a treaty under the Convention may take place : “(a) in conformity with the provisions of the treaty ; or (b) at any time by consent of all the parties after consultation with other contracting States” (Art. 54).

The General Act laid down the minimum period for which it should be in force, provided for automatic renewal for five-year periods, and prescribed the form and means of denunciation (Art. 45). Like the Vienna Convention, the Act did not contemplate tacit abrogation ; and this is as it should be. To admit tacit abrogation would be to introduce confusion into the international system. Furthermore, if tacit abrogation were recognized, it would be necessary to produce proof of the *facta concludentia* which would have to be relied on to demonstrate the *contrarius consensus* of the parties, and proof of sufficient force to relieve the parties of the obligation undertaken by them under the treaty.

(f) It seems to me to be going too far to argue from the silence surrounding the Act that this is such as to give rise to a presumption of lapse¹. Digests and lists of treaties in force have continued to mention the Act ; legal authors have done likewise².

In the Court also, Judge Basdevant affirmed that the General Act was still in force and that it was therefore in force between France and Norway, which were both signatories to it. He drew attention to the fact that the Act had been mentioned in the Observations of the French Government and had later been explicitly invoked by the Agent of that Government as a basis of the Court's jurisdiction in the case : he likewise pointed out that the Act had also been mentioned by counsel for the Norwegian Government (**I.C.J.** Reports 1957, p. 74). This is an opinion of considerable authority. But it seems to me relevant also to observe that, when the Court (despite Judge Basdevant's opinion) dismissed the French claim in the *Certain Norwegian Loans case*, it did not throw doubt on the validity and efficacy of the General Act¹.

The dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo, in the case concerning Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide, also referred to the 1928 General Act and to the Revised Act (**I.C.J.** Reports 1951, p. 37)².

In my view, one can only agree with the following statement, taken from a special study of the matter :

“In conclusion it may be affirmed that the General Act of Geneva is in force between twenty contracting States³ which are still bound by the Act, and not only in a purely formal way, for it retains full efficacy for the contracting States despite the disappearance of some organs of the League of Nations⁴.”

(g) The continuance in force of the General Act being admitted, it has still been possible to ask whether the French declaration recognizing the compulsory jurisdiction of the Court, with the 1966 reservation as to national defence, might not have modified the obligations undertaken by France when it signed the Act, in particular those contained in Chapter II. In

more general terms, the question is whether the treaties and conventions in force in which acceptance of the Court's jurisdiction is specially provided for (the hypothesis of Art. 36, para. 1, of the Statute), are sub-ordinate to the unilateral declarations made by States accepting the compulsory jurisdiction of the Court (the hypothesis of Art. 36, para. 2), or depend on those declarations, with the result that the abrogation of that obligation to be subject to the Court's jurisdiction, or its limitation by the introduction of additional reservations, also entails the abrogation or limitation of the obligations undertaken under a previous bilateral or multilateral convention.

The respect due to the sovereignty of States, and the optional nature of the Court's jurisdiction (Art. 2, para. 7, of the Charter), would not seem to warrant setting aside the principle of *pacta sunt servanda*, an essential pillar of international law. Once submission to the Court's jurisdiction has been established in a treaty or convention (Art. 36, para. 1, of the Statute), the parties to the treaty or convention cannot of their own free will and by unilateral declaration escape the obligation undertaken toward another State. Such declaration does not have prevailing force simply because it provides for the jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute, or because it is made subject to reservations, or enshrines a possibility of arbitrarily depriving the Court of jurisdiction. To undo the obligation undertaken, it will always be necessary to denounce the treaty or convention in force, in accordance with the prescribed conditions.

Even if it be thought that a declaration filed under Article 36, paragraph 2, of the Statute gives rise to obligations of a contractual nature, the answer would still be that such declaration cannot free the declarant State from all or any of the obligations which it has already undertaken in a prior agreement, otherwise than in accordance with the conditions laid down in that agreement. For there to be implied termination of a treaty as a result of the conclusion of a subsequent treaty, a primary requirement is that "all the parties to it conclude a later treaty relating to the same subject-matter" (Vienna Convention, Art. 59).

It should also be noted that there is not such incompatibility between declarations made by virtue of Article 36, paragraph 2, of the Statute, and the General Act, as to give rise to tacit abrogation as a result of a new treaty. The Act operates between the signatories thereto, a closed group of 20 States, and imposes special conditions and limitations on the parties. The Statute, on the contrary, according to the interpretation which has been given of Article 36, paragraph 2, opens the door to practically all States (Art. 93 of the Charter), and permits of conditions and reservations of any kind whatever being laid down.

The relationship between the General Act and subsequent acceptance of the compulsory jurisdiction of the Court has been explained in a concise and masterly fashion by Judge Basdevant:

"A way of access to the Court was opened up by the accession of the two Parties to the General Act of 1928. It could not be closed or cancelled out by the restrictive clause which the French Government, and not the Norwegian Government, added to its fresh acceptance of compulsory jurisdiction stated in its Declaration of 1949. This restrictive clause, emanating from only one of them, does not constitute the law as between France and Norway. The clause is not sufficient to set aside the juridical system existing between them on this point. It cannot close the way of access to the Court that was formerly open, or cancel it out with the result that no jurisdiction would remain." (**I.C.J.** Reports 1957, pp. 75 f.)

(h) There still remains a teasing mystery: why did the French Government not denounce the General Act at the appropriate time and in accordance with the required forms, in exercise of Article 45, paragraph 3, of the Act, at the time in 1966 when it filed its declaration recognizing the jurisdiction of the Court subject to new reservations? It seems obvious that the French

Government was in 1966 not willing that questions concerning national defence should be capable of being brought before the Court, and we simply do not know why the French Government preserved the Court's jurisdiction herein vis-à-vis the signatories to the Act¹. But this anomalous situation cannot be regarded as sufficient to give rise to a presumption of tacit denunciation of the General Act by the French Government, and to confer on such denunciation legal effectiveness in violation of the provisions of the Act itself. To admit this would be contrary to the most respected principles of the law of treaties ; it would be contrary to legal security and even to the requirements of the law as to presumptions.

III. The Admissibility of the Application

1. The Order of 22 June 1973 decided that the written pleadings should be addressed both to the question of the Court's jurisdiction to entertain the dispute and to that of the admissibility of the Application. The Court has thus followed Article 67 of its Rules.

The term "admissibility" is a very wide one, but the Order, in paragraph 23, throws some light on the meaning in which it uses it, by stating that it cannot be assumed *a priori* that the Applicant "may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application".

The question is whether the Applicant, in its submissions, has or has not asserted a legal interest as basis of its action. At the preliminary stage contemplated by the Order, the Court has first to consider whether the Applicant is entitled to open the proceedings (*legitimatío ad processum, Rechtsschutzanspruch*), to set the procedural machinery in motion, before turning to examination of the merits of the case. Subsequently the question would arise as to whether the interest alleged was, in fact and in law, worthy of legal protection¹. But that would belong to the merits of the case, and it therefore does not fall to be considered here.

The Applicant refers to violations by France of several legal rules, and endeavours to show that it has a legal interest to complain of each of these violations. It will therefore be necessary to examine the interest thus invoked in each case of alleged violation, but it would be as well for me first of all to devote some attention to the meaning of the expression "legal interest".

2. The idea of legal interest is at the very heart of the rules of procedure (cf. the maxim "no interest, no action"). It must therefore be used with the exactitude required by its judicial function. The General Act affords a good guide in this respect : it distinguishes between "disputes of every kind" which may be submitted to the procedure of conciliation (Art. 1), the case of "an interest of a legal nature" in a dispute for purposes of intervention (Art. 36), and "all disputes with regard to which the Parties are in conflict as to their respective rights" (Art. 17) ; only the latter are disputes appropriate to judicial settlement, and capable of being submitted for decision to the Permanent Court of International Justice in accordance with the General Act².

As is apparent, Article 17 of the General Act does not permit of an extensive interpretation of the "legal interest" which may be asserted before the Court. What is contemplated is a right specific to the Applicant which is at the heart of a dispute, because it is the subject of conflicting claims between the Applicant and the Respondent. Thus it is a right in the proper sense of that term (*ius dominativum*), the nature of which is that it belongs to one or another State, that State being entitled to negotiate in respect thereof, and to renounce it.

The Applicant however seems to overlook Article 17, and considers that it is sufficient for it to have a collective or general interest. It has cited several authorities to support its view that international law recognizes that every State has an interest of a legal nature in the observation by other countries of the obligations imposed upon them by international law, and to the effect also that law recognizes an interest of all States with regard to general humanitarian causes.

If the texts which have been cited are closely examined, a different conclusion emerges. In *South West Africa (Preliminary Objections)* Judge Jessup showed how international law has recognized that States may have interests in matters which do not affect their “material” or, say, “physical” or “tangible” interests. But Judge Jessup also observes that “States have asserted such legal interests on the basis of some treaty”; in support of this observation he mentions the minorities treaties, the Convention for the Prevention and Punishment of the Crime of Genocide, conventions sponsored by the International Labour Organisation, and the mandates system (separate opinion, *I.C.J. Reports 1962*, pp. 425 ff.). Judge Jessup's opinion in the second phase of the *South West Africa* cases, in which he criticizes the Court's Judgment, which did not recognize that the Applicants or any State had a right of a recourse to a tribunal when the Applicant does not allege its own legal interest relative to the merits, is very subtly argued. Judge Jessup took into account the fact that it was a question of “fulfilment of fundamental treaty obligations contained in a treaty which has what may fairly be called constitutional characteristics” (dissenting opinion, *I.C.J. Reports 1966*, p. 386). More specifically, he added : “There is no generally established *actio popularis* in international law” (*ibid.*, p. 387). In the same case Judge Tanaka stated :

“We consider that in these treaties and organizations common and humanitarian interests are incorporated. By being given organizational form, these interests take the nature of ‘legal interest’ and require to be protected by specific procedural means.” (Dissenting opinion, *I.C.J. Reports 1966*, p. 252).

In reply to the argument that it 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”, the Court stated :

“... 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” (*I.C.J. Reports 1966*, p. 47, para. 88).

On the other hand the Court has also said that :

“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*” (*I.C.J. Reports 1970*, p. 32, para. 33.)

These remarks, which have been described as progressive and have been regarded as worthy of sympathetic consideration, should be taken *cum grano salis*. It seems to me that the *obiter* reasoning expressed therein should not be regarded as amounting to recognition of the *actio popularis* in international law ; it should be interpreted more in conformity with the general practice accepted as law. I am unable to believe that by virtue of this dictum the Court would regard as admissible, for example, a claim by State A against State B that B was not applying “principles and rules concerning the basic rights of the human person” (*I.C.J. Reports 1970*, p. 32, para. 34) with regard to the subjects of State B or even State C. Perhaps in drafting the paragraph in question the Court was thinking of the case where State B injured subjects of State A by violating the fundamental rights of the human person. It should also be borne in mind that the Court appears to restrict its dictum on the same lines as Judges Jessup and Tanaka when referring to “international instruments of a universal or quasi-universal character” (*I.C.J. Reports 1970*, p. 32, para. 34)¹.

In any event, if, as appears to me to be the case, the Court's jurisdiction in the present case is based upon Article 17 of the General Act and not on the French declaration of 1966, the Application is not admissible unless the Applicant shows the existence of a right of its own which it

asserts to have been violated by the act of the Respondent.

3. The claim that the Court should declare that atmospheric **nuclear tests** are unlawful by virtue of a general rule of international law, and that all States, including the Applicant, have the right to call upon France to refrain from carrying out this sort of **test**, gives rise to numerous doubts.

Can the question be settled in accordance with international law, or does it still fall within the political domain? There is also the question whether this is a matter of admissibility or one going to the merits. A distinction must be made as to whether it relates to the political or judicial character of the case (a question of admissibility), or whether it relates to the rule to be applied and the circumstances in which that rule can be regarded as part of customary law (a question going to the merits) ¹. This is a difficulty which could have been resolved by joining the question of admissibility to the merits.

But there is no need to settle these points. In my opinion, it is clear that the Applicant is not entitled to ask the Court to declare that atmospheric **nuclear tests** are unlawful. The Applicant does not have its own material legal interest, still less a right which has been disputed by the other Party as required by the General Act. The request that the Court make a general and abstract declaration as to the existence of a rule of law goes beyond the Court's judicial function. The Court has no jurisdiction to declare that all atmospheric **nuclear tests** are unlawful, even if as a matter of conscience it considers that such **tests**, or even all **nuclear tests** in general, are contrary to morality and to every humanitarian consideration.

4. The right relied on by the Applicant with regard to the deposit of radio-active fall-out on its territory was considered in the Order of 22 June 1973 (para. 30). We must now consider whether reliance on this right makes the request for examination of the merits of the case admissible. The Applicant's complaint against France of violation of its sovereignty by introducing harmful matter into its territory without its permission is based on a legal interest which has been well known since the time of Roman law. The prohibition of *immissio* (of water, smoke, fragments of stone) into a neighbouring property was a feature of Roman law (D. 8, 5, 8, para. 5). The principle *sic utere tuo ut aliaenum non laedas* is a feature of law both ancient and modern. It is well known that the owner of a property is liable for intolerable smoke or smells, "because he oversteps [the physical limits of his property], because there is *immissio* over the neighbouring properties, because he causes injury ²".

In international law, the duty of each State not to use its territory for acts contrary to the rights of other States might be mentioned (*J.C.J. Reports 1949*, p. 22). The arbitral awards of 16 April 1938 and 11 March 1941 given in a dispute between the United States and Canada mention the lack of precedents as to pollution of the air, but also the analogy with pollution of water, and the Swiss litigation between the cantons of Solothurn and Aargau ¹. The conflict between the United States and Canada with regard to the *Trail Smelter* was decided on the basis of the following rule :

"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 ... when the case is of serious consequence and the injury is established by clear and convincing evidence." (*Trail Smelter* arbitration, 1938–1941, *United States of America v. Canada*, UNRIAA, Vol. III, p. 1965 ².)

If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighbouring properties of noxious fumes ³, the consequence must be drawn, by an obvious analogy, that the Applicant is entitled to ask the Court to uphold its claim that France should put an end to the deposit of radio-active fall-out on its territory.

The question whether the deposit of radio-active substances on the Applicant's territory as a result of the French **nuclear tests** is harmful to the Applicant should only be settled in the course of

proceedings on the merits in which the Court would consider whether intrusion or trespass into the territory of another is unlawful in itself or only if it gives rise to damage ; in the latter hypothesis, it would still have to consider the nature of the alleged damage ⁴, its existence ⁵ and its relative importance ¹, in order to pronounce on the claim for prohibition of the French **nuclear tests** ².

5. A third complaint against France is based upon infringement of the principle of freedom of the high seas as the result of restrictions on navigation and flying due to the establishment of forbidden zones. This raises delicate legal questions.

Is the carrying-out of **nuclear tests** over the sea, and the establishment of forbidden zones, part of the other freedoms “which are recognized by the general principles of international law” or is it contrary to the freedoms of other States? Are we dealing with a case analogous to that of the establishment of forbidden zones for firing practice or naval manoeuvres? The interpretation of Article 2, paragraph 2, of the Convention on the High Seas requires that in each case reasonable regard be had to the interests of other States in their exercise of their freedom of the high seas ; the nature and the importance of the interests involved must be considered, as must the principle of non-harmful use (*prodesse enim sibi unusquisque, dum alii non nocet, non prohibetur*, D. 39, 3, 1, para. 11), of the misuse of rights, and of good faith in the exercise of freedoms.

The question of **nuclear tests** was examined by the 1958 Conference on the Law of the Sea. A strong tendency to condemn **nuclear testing** was then apparent, yet the Conference accepted India's proposal ; it recognized that there was apprehension on the part of many States that **nuclear** explosions might constitute an infringement of freedom of the high seas, and referred the matter to the General Assembly for appropriate action.

The complaint against France on this head therefore raises questions of law and questions of fact relating to the merits of the case, which should not be examined and dealt with at the preliminary stage of proceedings contemplated by the Order of 22 June 1973.

It seems to me that this third complaint is not admissible in the form in which it has been presented. The Applicant is not relying on a right of its own disputed by France, and does not base its Application on any material injury, responsibility for which it is prepared to prove lies upon France ³. The Applicant has no legal title authorizing it to act as spokesman for the international community and ask the Court to condemn France's conduct. The Court cannot go beyond its judicial functions and determine in a general way what France's duties are with regard to the freedoms of the sea.

(Signed) F. de Castro.

Dissenting Opinion of Judge Sir Garfield Barwick

Judge Sir Garfield Barwick

1 The Court, by its Order of 22 June 1973, separated two questions, that of its jurisdiction to hear and determine the Application, and that of the admissibility of the Application from all other questions in the case. It directed that “the written proceedings shall first be addressed” to those questions. These were therefore the only questions to which the Parties were to direct their attention. Each question related to the situation which obtained at the date the Application was lodged with the Court, namely 9 May 1973. The Applicant in obedience to the Court's Order has confined its Memorial and its oral argument to those questions. Neither Memorial nor argument has been directed to any other question.

2 Having read the Memorial and heard that argument, the Court has discussed those questions but, whilst the Parties await the Court's decision upon them, the Court of its own motion and without any notice to the Parties has decided the question whether the Application has ceased to have any object by reason of events which have occurred since the Application was lodged. It has taken

cognizance of information as to events said to have occurred since the close of the oral proceedings and has treated it as evidence in the proceedings. It has not informed the Parties of the material which it has thus introduced into evidence. By the use of it the Court has drawn a conclusion of fact. It has also placed a particular interpretation upon the Application. Upon this conclusion of fact and this interpretation of the Application the Court has decided the question whether the Application has ceased to have any object. That question, in my opinion, is not embraced within either of the two questions on which argument has been heard. It is a separate, a different and a new question. Thus the Parties have had no opportunity of placing before the Court their submissions as to the proper conclusion to be drawn from events which have supervened on the lodging of the Application or upon the proper interpretation of the Application itself in so far as each related to the question the Court has decided or as to the propriety of deciding that question in the sense in which the Court has decided it or at all at this stage of the proceedings : for it may have been argued that that question if it arose was not of an exclusively preliminary character in the circumstances of this case. The conclusion of fact and the interpretation of the Application are clearly matters about which opinions differ. Further, the reasoning of the Judgment involves important considerations of international law. Therefore, there was ample room for argument and for the assistance of counsel. In any case the Applicant must have been entitled to make submissions as to all the matters involved in the decision of the Court.

3 However, without notifying the Parties of what it was considering and without hearing them, the Court, by a Judgment by which it decides to proceed no further in the case, avoids deciding either of the two matters which it directed to be, and which have been argued.

4 This, in my opinion, is an unjustifiable course, uncharacteristic of a court of justice. It is a procedure which in my opinion is unjust, failing to fulfil an essential obligation of the Court's judicial process. As a judge I can have no part in it, and for that reason, if for no other, I could not join in the Judgment of the Court. However I am also unable to join in that Judgment because I do not accept its reasoning or that the material on which the Court has acted warrants the Court's conclusion. With regret therefore I dissent from the Judgment.

5 It may be thought quite reasonable that if France is willing to give to Australia such an unqualified and binding promise as Australia finds satisfactory for its protection never again to **test nuclear** weapons in the atmosphere of the South Pacific, this case should be compromised and the Application withdrawn. But that is a matter entirely for the sovereign States. It is not a matter for this Court. The Rules of Court provide the means whereby the proceedings can be discontinued at the will of the Parties (see Arts. 73 and 74 of the Rules of Court). It is no part of the Court's function to place any pressure on a State to compromise its claim or itself to effect a compromise.

6 It may be that a layman, with no loyalty to the law might quite reasonably think that a political decision by France no longer to exercise what it claims to be its right of **testing nuclear** weapons in the atmosphere, when formally publicized, might be treated as the end of the matter between Australia and France. But this is a court of justice, with a loyalty to the law and its administration. It is unable to take the layman's view and must confine itself to legal principles and to their application.

7 The Court has decided that the Application has become "without object" and that therefore the Court is not called upon to give a decision upon it. The term "without object" in this universe of discourse when applied to an application or claim, so far as relevant to the circumstances of this case, I understand to imply that no dispute exists between the Parties which is capable of resolution by the Court by the application of legal norms available to the Court or that the relief which is sought is incapable of being granted by the Court or that in the circumstances which obtain or would obtain at the time the Court is called upon to grant the relief claimed, no order productive of effect upon the Parties or their rights could properly be made by the Court in exercising its judicial function.

8 To apply the expression “has become without object” to the present circumstances, means in my opinion, that this Judgment can only be valid if the dispute between France and Australia as to their respective rights has been resolved ; has ceased to exist or if the Court, in the circumstances now prevailing, cannot with propriety, within its judicial function, make any declaration or Order having effect between the Parties.

9 It should be observed that I have described the dispute between France and Australia as a dispute as to their respective rights. I shall at a later stage express my reasons for my opinion that that is the nature of their dispute. But it is proper to point out immediately that if the Parties were not in dispute as to their respective rights the Application would have been “without object” when lodged, and no question of its having *no longer* any object could arise. On the other hand if the Parties were in dispute as to their respective rights, it is that dispute which is relevant in any consideration of the question whether or not the Application no longer has any object.

10 Of course, if the Court lacked jurisdiction or if the Application as lodged was inadmissible because the Parties were never in dispute as to their legal rights, the Court would be not required to go any further in the matter. But the Court has not expressed itself on those matters. The Judgment is not founded either on a lack of jurisdiction or on the inadmissibility of the Application when lodged, though it seems to concede inferentially that the Application was admissible when lodged.

11 In order to make my view in this matter as clear as I am able, it will be necessary for me in the first place to discuss the only two questions on which the Court has heard argument. Thereafter I shall express my reasons for dissenting from the Court's Judgment (see p. 439 of this opinion). I shall first state my conclusions and later develop my reasons for them.

12 In my opinion, the Court has jurisdiction to hear a dispute between France and Australia as to their respective rights by virtue of Articles 36 (1) and 37 of the Statute of the Court and Article 17 of the General Act of Geneva of 26 September 1928. Further, I am of opinion that at the date the Application was lodged with the Court, France and Australia were, and in my opinion still are, in dispute as to their respective rights in relation to the consequences in the Australian territory and environment of the explosion by France in the South Pacific of **nuclear** devices.

13 Further, they were, and still are, in difference as to the lawfulness or unlawfulness according to customary international law of the **testing** of **nuclear** weapons in the atmosphere. Subject to the determination of the question whether the Applicant has a legal interest to maintain its Application in respect of this difference, I am of opinion that the Parties were, at the date of the Application, and still are, in dispute as to their respective rights in respect of the **testing** of **nuclear** weapons in the atmosphere.

14 If it be a separate question in this case, I am of opinion that the claim of the Applicant is admissible in respect of all the bases upon which it is made, with the exception of the basis relating to the unlawfulness of the **testing** of **nuclear** weapons in the atmosphere. I am of opinion that the question whether the Applicant has a legal interest to maintain its claim in respect of that basis is not a question of an exclusively preliminary character, and that it cannot be decided at this stage of the proceedings.

15 The distinctions implicit in this statement of conclusions will be developed later in this opinion.

16 I approach the Court's Judgment therefore with the view that the Court is presently seized of an Application which to the extent indicated is admissible and which the Court is competent to hear and determine. I am of opinion that consistently under Article 38 the Court should have decided its jurisdiction and if it be a separate question the admissibility of the Application.

17 I am of opinion that the dispute between the Parties as to their legal rights was not resolved or caused to disappear by the communiqué and statements quoted in the Judgment and that the

Parties remained at the date of the Judgment in dispute as to their legal rights. This is so, in my opinion, even if, contrary to the view I hold, the communiqué and statements amounted to an assurance by France that it would not again **test nuclear** weapons in the atmosphere. That assurance, if given, did not concede any rights in Australia in relation to **nuclear** explosions or the **testing** of **nuclear** weapons : indeed, it impliedly asserted a right in France to continue such explosions or **tests** . Such an assurance would of itself in my opinion be incapable of resolving a dispute as to legal rights.

18 I am further of opinion that the Judgment is not supportable on the material and grounds on which it is based.

19 I now proceed to express my reasons for the several conclusions I have expressed.

Indication of Interim Measures

20 On 22 June 1973, the Court by a majority indicated by way of interim measures pending the Court's final decision in the proceedings that :

“The Governments of Australia and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case ; and, in particular, the French Government should avoid **nuclear tests** causing the deposit of radioactive fall-out on Australian territory.”

In its Order the Court recited that :

“Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded ...”

After indicating in paragraph 14 of the Order that the Government of Australia (the Applicant) claimed to found the jurisdiction of the Court to entertain its Application upon (1) Article 17 of the General Act of Geneva of 26 September 1928, read with Articles 36 (1) and 37 of the Statute of the Court, and (2) alternatively, on Article 36 (2) of the Statute of the Court and the respective declarations of Australia and France made thereunder, this Court concluded that :

“Whereas the material submitted to the Court leads it to the conclusion, at the present stage of the proceedings, that the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded ; and whereas the Court will accordingly proceed to examine the Applicant's request for the indication of interim measures of protection ...”

21 In indicating summarily in my declaration of 22 June 1973 my reason for joining the majority in indicating interim measures, I said :

“I have voted for the indication of interim measures and the Order of the Court as to the further procedure in the case because the very thorough discussions in which the Court has engaged over the past weeks and my own researches have convinced me that the General Act of 1928 and the French Government's declaration to the compulsory jurisdiction of the Court with reservations each provide, *prima facie*, a basis on which the Court might have jurisdiction to entertain and decide the claims made by Australia in its Application of 9 May 1973.”

I did so to emphasize the fact that the Court had at that time examined its jurisdiction in considerable depth and that it had not acted upon any presumptions nor upon any merely cursory

considerations. Consistently with the Court's jurisprudence as a result of this examination there appeared, *prima facie*, a basis on which the Court's jurisdiction might be founded.

22 For my own part I felt, at that time, that it was probable that the General Act of Geneva of 26 September 1928 (the General Act) continued at the date of the Application to be valid as a treaty in force between Australia and France and that the dispute between those States, as evidenced in the material lodged with the Application, fell within the scope of Article 17 of the General Act.

23 Declarations by France and Australia to the compulsory jurisdiction of the Court under Article 36 (2) of the Court's Statute with the respective reservations, but particularly that of France of 20 May 1966, as a source of the Court's jurisdiction raised other questions which I had then no need to resolve but which did not *ex facie*, in my opinion, necessarily deny the possibility of that jurisdiction.

24 In order to resolve as soon as possible the questions of its jurisdiction and the admissibility of the Application, the Court decided that the written proceedings should first be addressed to those questions.

Whether First to Decide Jurisdiction or Admissibility

25 In the reported decisions of the Court, and in the recorded opinions of individual judges, and in the literature of international law, I do not find any definition of admissibility which can be universally applied. A description of admissibility of great width was suggested in the dissenting opinion of Judge Petrán in this case (*I.C.J. Reports 1973*, p. 126) ; in the dissenting opinion of Judge Gros, the suggestion was made that the lack of a justiciable dispute, one which could be resolved by the application of legal norms, made the Application "without object" and thus from the outset inadmissible. In his declaration made at that time, Judge Jiménez de Aréchaga pointed to the expressions in paragraph 23 of the Court's Order as indicating that the existence of a legal interest of the Applicant in respect of its claims was one aspect of admissibility.

26 The Applicant confined its Memorial and its oral argument in relation to the question of admissibility substantially to the question whether it had a legal interest to maintain its Application. But the Court itself gave no approval to any such particular view of admissibility. Intervention by the President during argument indicated that the Court would decide for itself the ambit of the question of admissibility, that is to say, in particular that it would not necessarily confine itself to the view seemingly adopted by counsel. I shall need later to discuss the aspect of admissibility which, if it is a question in this case separate from that of jurisdiction, is appropriate for consideration.

27 The question may arise at the preliminary stage of a matter whether the admissibility of an application or reference ought first to be decided before any question of jurisdiction is determined. Opinion appears to be divided as to whether or not in any case jurisdiction should first be established before the admissibility of an application is considered, see for example on the one hand the views expressed in the separate opinion of Judge Sir Percy Spender, in the dissenting opinions of President Klaestad, Judge Armand-Ugon and Judge Sir Hersch Lauterpacht in the *Interhandel* case (*Switzerland v. United States of America*, *I.C.J. Reports 1959*, at p. 6) and, on the other hand, the views expressed by Judge Sir Gerald Fitzmaurice in his separate opinion in the case of the *Northern Cameroons* (*Cameroon v. United Kingdom*, *I.C.J. Reports 1963*, p. 15). There is no universal rule clearly expressed in the decisions of the Court that the one question in every case should be determined before the other.

28 But granted that there can be cases in which this Court ought to decide the admissibility of a matter before ascertaining the existence or extent of its own jurisdiction, I am of the opinion that in this case the Court's jurisdiction ought first to be determined. There are two reasons for my decision in this sense. First, there is said to be a question of admissibility in this case which, even if it exists as a separate question, seems to me to be bound up with the question of jurisdiction and

which, because of the suggested source of jurisdiction in Article 17 of the General Act, to my mind is scarcely capable of discussion in complete isolation from that question. Second, the Court has already indicated interim measures and emphasized the need for an early definitive resolution of its jurisdiction to hear the Application. It would not be judicially proper, in my opinion, now to avoid a decision as to the jurisdiction of the Court by prior concentration on the admissibility of the Application, treating the two concepts as mutually exclusive in relation to the present case.

The Questions to Possess an Exclusively Preliminary Character

29 I should at this stage make some general observations as to the nature of the examination of jurisdiction and of admissibility which should take place in pursuance of the Court's Order of 22 June 1973. Though not so expressly stated in the Court's Order, these questions, as I understand the position, were conceived to be of a preliminary nature, to be argued and decided as such. They are to be dealt with at this stage to the extent that each possesses "an exclusively preliminary character", otherwise their consideration must be relegated to the hearing of the merits.

30 In amending its Rules on 10 May 1972 and in including in them Article 67 (7) as it now appears, the Court provided for the possibility of a two-stage hearing of a case, in the first stage of which questions of jurisdiction and admissibility, as well as any other preliminary question, might be decided, if those questions could be decided as matters of an exclusively preliminary character. Textually, Article 67 as a whole depends for its operation upon an objection to the jurisdiction of the Court or to the admissibility of the Application by a respondent party in accordance with the Rules of Court. There has been no objection by the Respondent to the jurisdiction of the Court or to the admissibility of the Application in this case conformable to Article 67 of the Court's Rules. Thus, technically it may be said that Article 67 (7) does not control the proceedings at this stage. But though not formally controlling this stage of the case, Article 67 (7) and its very presence in the Rules of Court must have some bearing upon the nature of the examination which is to be made of these two questions. The Article is emphatic of the proposition that if such questions as jurisdiction or admissibility are separated from the hearing of the merits, they may only be decided apart from the merits if they possess an exclusively preliminary character ; that is to say if they can be decided without trenching on the merits of the case. The Court's division of this case into stages by its Order of 22 June 1973 must therefore be accommodated to the spirit of its Rules, so that only questions may be decided at this stage which possess an exclusively preliminary character. It was apparent from the contents of the Applicant's Memorial and from the course of the oral argument, that the Applicant understood the decision of each question depended on it being of such a preliminary kind. There has been no indication of any dissent from that view.

Position of Article 53

31 Article 53 of the Statute of the Court is in the following terms :

- 1.** 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.
- 2.** The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

Action pursuant to the Article may be called for by a party when the other is in default either of appearance or of defence. When the Court is required by a party to decide its claim notwithstanding such default of the other, the Court, before deciding the claim, must satisfy itself both of its own jurisdiction and of the validity of the claim both in fact and in law. Without the inclusion of this Article in the Statute of the Court, there would surely have been power in the Court, satisfied of its own jurisdiction and of the validity of the applicant State's claim, to give judgment for the applicant, notwithstanding the default of appearance or of defence by the respondent party.

The Article is confirmatory of such a power and its inclusion in the Statute was doubtless prompted by the circumstance that the litigants before the Court are sovereign States, and that the presence of the Article would indicate consent to proceedings in default.

32 As expressed, the Article is dealing in my opinion exclusively with the stage of the proceedings at which the merits of the claim are to be considered and decided. For this reason, and because of the very nature of and of the occasion for the indication of interim measures, Article 53, in my opinion, can have no bearing on that phase of a case. The Court has so treated the Article when considering the indication of interim measures in the past, as, for example, in paragraph 15 of its Order indicating interim measures in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case (*I.C.J. Reports 1972*, p. 15) and in paragraph 13 of the Order of 22 June, made in this case (*I.C.J. Reports 1973*, p. 101). The Court expressed itself in these cases as to the extent to which it must be satisfied in relation to its own jurisdiction in a manner quite inconsistent with the view that Article 53 controlled the stage of the proceedings in which the indication of interim measures was being considered. These expressions of the Court were not inconsistent in my opinion with the views expressed by Sir Hersch Lauterpacht at page 118 of the Reports of the *Interhandel* case (*I.C.J. Reports 1957*, p. 105) ; but the Court has been unwilling to accept the exacting views of Judges Winiarski and Badawi Pasha, expressed in the *Anglo-Iranian Oil Co. case* (*I.C.J. Reports 1951*, pp. 96–98), views which were endorsed by Judge Padilla Nervo in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1972*, at p. 21).

33 Allowing the importance of the fundamental consideration that the Court is a court of limited jurisdiction founded ultimately on the consent of States, it is essential to observe that Article 41 of the Statute of the Court gives it express power to indicate interim measures if it considers that circumstances so require and that, unlike Article 53, Article 41 does not hedge round that power expressly or, as I think, impliedly, with any considerations of jurisdiction or of the merits of the case. Paragraph 2 of Article 41, in opening with the expression “pending the final decision” makes it apparent to my mind that Article 53 does not refer to or control consideration of the indication of interim measures. Consequently, I am unable, with respect, to agree with those who hold a contrary view. But although Article 41 does not refer to questions of jurisdiction or the merits, the Court will consider its jurisdiction to the extent already expressed before indicating interim measures, and an obvious lack of merit will no doubt be influential in deciding whether or not to indicate interim measures.

34 The Applicant has not yet called upon the Court to decide its claim. Indeed, the Court's direction of 22 June separating the two questions of jurisdiction and admissibility from the merits has precluded any such step on the part of the Applicant. Thus Article 53 has not been called into operation at this stage of the proceedings. The Court by its Order has directed consideration of its jurisdiction at this stage. If the examination by the Court of that jurisdiction results in an affirmance of its jurisdiction, that conclusion will of course satisfy part of the requirements of Article 53 when it is called into play. No doubt, having made its Order of 22 June, the Court, quite apart from the provisions of Article 53, could go no further in the case unless it was either satisfied of its jurisdiction and of the admissibility of the Application or concluded that in the circumstances of the case either of those questions failed to possess an exclusively preliminary character. In that event, that question could be decided at the stage of the merits, which Article 53 appears to contemplate. Neither Article 53 nor any other part of the Statute of the Court refers to the admissibility of the Application.

Jurisdiction

35 I turn then to the question of the Court's jurisdiction to hear and determine the Application. It was duly filed with the Court on 9 May 1973. This is the date by reference to which the questions of jurisdiction and of admissibility must be determined. The concluding paragraphs of the Application are as follows :

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

And to Order

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

36 It is of importance that I emphasize at the outset that the Application seeks both a declaration and an Order. The request for the declaration is itself, in my opinion, clearly a matter of substantive relief and not merely a recital or reason put forward for the request for the making of the Order. Indeed, it is conceivable that in appropriate circumstances the declaration only should be made. The full significance of this fundamental observation as to the nature of the relief sought will be apparent at a later stage.

37 The Court duly notified France by telegram of the filing of the Application, and a copy of the Application itself was duly transmitted to the French Government in due time.

Article 38 (3) of the Rules of Court requires that when acknowledging receipt of such a notification from the Court, the party against whom the Application is made and who is so notified shall, when acknowledging receipt of the notification, or failing this as soon as possible, inform the Court of the name of its Agent.

38 By a letter dated 16 May 1973 France, by its Ambassador to the Netherlands, acknowledged receipt of the notification of the filing of the Application, but France did not appoint an Agent. France informed the Court that in its view, that is to say, in France's view, the Court was manifestly without jurisdiction to hear and determine the Application, and that France did not propose to participate in the proceedings before the Court. It has not done so by any formal act according to the Rules of Court. France requested that the Application be summarily struck from the Court's General List, which in June 1973 the Court refused to do, an attitude confirmed by its final Judgment.

39 It is fundamental that the Court alone is competent to determine whether or not it has jurisdiction in any matter. This is provided by Article 36 (6) of the Statute of the Court. No State can determine that question. In its Rules, the Court has provided machinery whereby it can hear and consider the submissions of a State which claims that it has no jurisdiction in a particular matter (see Art. 67 of the Rules of Court). France has made no use of this facility. The case has proceeded without any objection to jurisdiction duly made according to the Rules of Court.

40 Attached to the Ambassador's letter of 16 May 1973 was an annex comprising some 11 pages of foolscap typescript setting out France's reasons for its conclusion that the Court was manifestly incompetent to entertain the Application. This document, which has come to be referred to in the proceedings as “the French Annex”, has occupied an ambiguous position throughout but has come to be treated somewhat in the light of a submission in a pleading, which, quite clearly, it is not. As I am but judge *ad hoc*, I will not express myself as to the desirability or undesirability of the reception of such a communication as the French Annex. I observe however that a somewhat similar happening occurred in connection with the *Fisheries Jurisdiction* case (*J.C.J. Reports 1973*, p. 1), but whether or not the Court allows such “submissions” to be made outside its Rules, as a regular practice, is a matter with which naturally I cannot be concerned.

41 Of course, a court, in the absence of a party, will of its own motion search most anxiously for reasons which might legitimately have been put forward by the absent party in opposition to the Application. Consequently, it could not be said to be unreasonable for the Court to view the contents of the French Annex, if and when received, as indicative of some of such reasons. Those contents and that of the French *White Paper* on **Nuclear Tests**, published but not

communicated to the Court during the hearing of the case, have in fact been fully considered.

42 I turn now to express my reasons for my conclusion that the General Act of Geneva of 26 September 1928 was a treaty in force between Australia and France at the date of the lodging of the Application, so as to found the jurisdiction of the Court under Article 36 (1) to decide a dispute between the Parties as to their respective rights.

43 The Applicant seeks to found the jurisdiction of the Court on two alternative bases ; it does not attempt to cumulate these bases, as was done by Belgium in the case of the *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series C, 1938, page 64*, with respect to the two bases which it put forward for the jurisdiction of the Court in that case. The Applicant does not attempt to make one basis assist or complement the other. It takes them, as in my opinion they are in the Statute of the Court, as two independent bases of jurisdiction or as may be more colourfully said, two independent avenues of approach to the Court. The Applicant's principal reliance is on the jurisdiction conferred on the Court by Article 36 (1) of its Statute, fulfilling that Article's specification of a "matter specially provided for in treaties and conventions in force", by resort to the combined operation of Article 17 of the General Act, Article 37 of the Court's Statute, and its dispute with France.

44 The alternative basis of jurisdiction is placed on Article 36 (2) of the Court's Statute, both France and Australia having declared under that Article to the compulsory jurisdiction of the Court, though in each case with reservations and, in particular, in the case of France, with the reservation of 20 May 1966.

45 As I have reached a firm view as to the existence of the Court's jurisdiction in this case under Article 36 (1) and as each basis of jurisdiction is put forward in the alternative, I find it unnecessary to express my conclusions as to the alternative basis of jurisdiction under Article 36 (2), which for me on that footing becomes irrelevant. I will need to deal however with the suggestion that a declaration to the optional clause in Article 36 (2) is inconsistent with a continuance of the obligations under the General Act and indeed superseded it. I will also need to deal with the further alternative suggestion that the reservation of 20 May 1966 by France to its declaration to the compulsory jurisdiction of the Court, qualifies to the extent of the terms of that reservation, its obligations, if any existed, under the General Act. I may properly say, however, that I would not be prepared to accept the whole of the Applicant's submission as to the meaning and operation of the French reservation of 20 May 1966 to its declaration to the compulsory jurisdiction of the Court.

46 It is trite that the jurisdiction of the Court depends fundamentally on the consent of States : but that consent may be given generally by a treaty as well as *ad hoc*. Whether it is given by a multilateral treaty or by a compromissory clause in a bilateral treaty the consent to jurisdiction is irrevocable and invariable except as provided by the treaty, so long as the treaty remains in force in accordance with the law of treaties. Consent thus given endures as provided by the treaty and does not need reaffirmation at any time in order to be effective. Where a treaty stipulates the manner in which its obligations are to be terminated or varied they can only be terminated or varied in accordance with those provisions during the life of the treaty. Thus the consent given by entry into the treaty is unsusceptible of withdrawal or variation by any unilateral act of either party except in conformity with the terms of the treaty itself. But there is the possibility of the due termination of the treaty by any of the circumstances, such as supervening impossibility of performance, fundamental change of circumstance, or entry into a later treaty between the same parties, which are referred to in the Vienna Convention on the Law of Treaties, as well as by termination by mutual consent or in conformity with the provisions of the treaties.

47 The General Act it would seem is properly classified as a multilateral treaty but by accession bilateral obligations were created. By Article 44 of the Act it was to come into force on the ninetieth day following the accession of not less than two States. Until then, to use an expression found in the *travaux préparatoires* it was "a convention in *spe*" (*Records of Ninth Ordinary Session of the*

Assembly, Minutes of First Committee, p. 70). In fact, conformably to this Article, the Act came into force on 16 August 1929. It was a great treaty, representing a most significant step forward in the cause of the pacific settlement of disputes. It had an initial term of five years, and was automatically renewed each five years dating from its original entry into force, unless denounced at least six months before the expiry of the current period of five years (Art. 45 (1)). Denunciation might be partial and consist of a notification of reservations not previously made (Art. 45 (5)). Denunciation was to be effected by a written notification to the Secretary-General of the League of Nations who was to inform all accessions to the Act (Art. 45 (3)). The Act covered conciliation of disputes of every kind which it had not been possible to settle by diplomacy (Chap. I), the judicial settlement of all disputes with respect to legal rights (Chap. II), and arbitration in a dispute not being a dispute as to legal rights (Chap. III). Accession could be to the whole Act or only to parts thereof, for example to Chapters I and II along with appropriate portions of the general provisions in Chapter IV or to Chapter I only with the appropriate portions of Chapter IV (Art. 38). The principle of reciprocity of obligations was introduced by the concluding words of Article 38.

48 France and Australia acceded to the whole of the General Act on 21 May 1931. Each attached conditions to its accession, and to these conditions I shall need later to make a brief reference. As at the date of the Application neither France nor Australia had denounced the General Act. France lodged with the Secretary-General of the United Nations on 10 January **1974** a notification designed as a denunciation in conformity with Article 45 of the General Act, but this notification is of no consequence in connection with the present question. Article 45 (5) of the Act provides that all proceedings pending at the expiry of the current period of the Act are to be duly completed notwithstanding denunciation. Further, the Court's general jurisprudence would not allow its jurisdiction to be terminated by the denunciation of the Treaty subsequent to the commencement of the proceedings before the Court (see *Nottebohm case (Liechtenstein v. Guatemala)*, **I.C.J. Reports 1953**, p. 110 at p. 122).

49 Article 17 in Chapter II of the General Act provides :

“All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice.”

Both France and Australia became Members of the United Nations at its inception, thus each was bound by the Court's Statute (see Art. 93 of the Charter). Therefore each was bound by Article 37 of the Statute of the Court which effectively substituted this Court for the Permanent Court of International Justice wherever a treaty in force provided for reference of a matter to the Permanent Court of International Justice. Clearly Article 17 did provide for the reference to the Court of all disputes with regard to which the parties are in conflict as to their respective rights. Thus the provisions of Article 17 must be read as between France and Australia as if they referred to the International Court of Justice and not to the Permanent Court of International Justice.

50 Whatever doubts might theretofore have been entertained as to the complete efficacy of Article 37 to effect such a substitution of this Court for the Permanent Court of International Justice as between Members of the United Nations were set at rest by the Judgment of this Court in the *Barcelona Traction, Light and Power Company, Limited case (Belgium v. Spain)*, **I.C.J. Reports 1964**, pp. 39 and 40). So unless the treaty obligations in Chapter II, which includes Article 17, of the General Act have been terminated or displaced in accordance with the law of treaties, the consent of France to the Court's jurisdiction to entertain and resolve a dispute between France and Australia as to their respective rights, subject to the effect of any reservations which may have been duly made under Article 39 of the General Act, would appear to be clear.

51 I have already mentioned that neither of the Parties had denounced the Act as of the date of the Application. The argument in the French Annex, to the contents of which I will need later to refer, is mainly that the General Act, by reason of matters to which the Annex calls attention, had lost its validity, but that if it had not, France's consent to the jurisdiction of the Court, given through Article 17 of the General Act, was withdrawn or qualified to the extent of the terms of its reservation of 20 May 1966 made to its declaration to the compulsory jurisdiction of the Court under Article 36 (2) of the Statute of the Court. It is therefore appropriate at this point to make some reference to the circumstances in which a treaty may be terminated.

52 The Vienna Convention on the Law of Treaties may in general be considered to reflect customary international law in respect of treaties. Thus, although France has not ratified this Convention, its provisions in Part V as to the invalidity, termination or suspension of treaties may be resorted to in considering the question whether the General Act was otherwise terminated before the commencement of these proceedings.

53 Taking seriatim those grounds of termination dealt with in Section 3 of Part V of the Convention which could possibly be relevant, there has been no consent by France and Australia to the termination of their obligations vis-à-vis one another under the General Act. I shall later point out in connection with the suggestion that the General Act lapsed by "desuetude" that there is no basis whatever in the material before the Court on which it could be held that the General Act had been terminated by mutual consent of these Parties as at the date of the Application (Art. 54 of the Convention). No subsequent treaty between France and Australia relating to the same subject-matter as that of the General Act has been concluded (Art. 59 of the Convention). Neither of these parties acceded to the amended General Act of 1949 to which I shall be making reference in due course. No material breach of the General Act by Australia has been invoked as a ground for terminating the General Act as between France and Australia. It will be necessary for me at a later stage to deal briefly with a suggestion that a purported reservation not made in due time by Australia in 1939 terminated the General Act as between France and Australia (Art. 60 of the Convention). There has been no supervening impossibility of performance of the General Act resulting from the permanent disappearance of an object indispensable for the execution of the Act, nor had any such ground of termination been invoked by France prior to the lodging of the Application (Art. 61 of the Convention). The effect of the demise of the League of Nations was not the disappearance of an object indispensable to the execution of the General Act, as I shall indicate in a subsequent part of this opinion. There has been no fundamental change of any circumstances which constituted an essential basis of the Treaty, and no such change has radically transformed the obligations under the Act (Art. 62 of the Convention). No obligation of the General Act is in conflict with any *jus cogens* (Art. 64 of the Convention). Article 65 of the Vienna Convention indicates that if any of these grounds of termination are to be relied upon, notification is necessary. In this case there has been no such notification.

54 On these considerations it would indeed be difficult not to conclude that the General Act was a treaty in force between France and Australia at the date of the Application and that the Parties had consented through the operation of Article 17 of the General Act and Article 37 of the Statute of the Court to the jurisdiction of this Court to resolve any dispute between them as to their respective rights.

55 But the French Annex confidently asserts the unavailability of the General Act as a source of this Court's jurisdiction to hear and determine the Application: it is said that the Act lacks present validity. It will therefore be necessary for me to examine the arguments put forward in the French Annex for this conclusion.

56 However, before turning to do so it is proper to point out that no jurist and no writer on international law has suggested that the General Act ceased to be in force at any time anterior to the lodging of the Application. Indeed, many distinguished writers expressed themselves to the

contrary. Professor O'Connell, in a footnote on page 1071 in the second volume of the second edition of his work on international law, says as to the General Act : "It is so connected with the machinery of the League of Nations that its status is unclear." The Professor was alone in making this observation : it suffices to say that the Professor's cogent advocacy on behalf of the Applicant in the present case seems to indicate that such a note will not appear in any further edition of his work.

57 No mention or discussion of the General Act in the Judgments of this Court has cast any doubt on its continued operation. Indeed, Judge Basdevant in the *Certain Norwegian Loans* case (*France v. Norway*, **I.C.J. Reports 1957**, at p. 74), refers to the General Act as a treaty or convention then in force between France and Norway. He points out that the Act was mentioned in the observations of the French Government and was explicitly invoked by the Agent of the French Government during the hearing. The distinguished judge said : "At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway." No judge in that case dissented from that view. Indeed, the Court in its Judgment does not say anything which would suggest that the Court doubted the continued validity of the General Act. In its Judgment the Court said :

"The French Government also referred ... to the General Act of Geneva of September 26th, 1928, to which both France and Norway *are* parties, as showing that the two Governments have agreed to submit their disputes to arbitration or judicial settlement in certain circumstances which it is unnecessary here to relate." (Emphasis added.)

France, for evident good reason (i.e., the applicability of Article 31 of the General Act in that case), did not seek to base the Court's jurisdiction in that case on the General Act, and as it had not done so the Court did not seek a basis for its jurisdiction in the General Act. The pertinent passage in the Judgment of the Court occurs at pages 24 and 25 of the *Reports*, where it is said :

"The French Government also referred to the Franco-Norwegian Arbitration Convention of 1904 and to the General Act of Geneva of September 26th, 1928, to which both France and Norway are parties, as showing that the two Governments have agreed to submit their disputes to arbitration or judicial settlement in certain circumstances which it is unnecessary here to relate.

These engagements were referred to in the Observations and Submissions of the French Government on the Preliminary Objections and subsequently and more explicitly in the oral presentations of the French Agent. Neither of these references, however, can be regarded as sufficient to justify the view that the Application of the French Government was, so far as the question of jurisdiction is concerned, based upon the Convention or the General Act. If the French Government had intended to proceed upon that basis it would expressly have so stated.

As already shown, the Application of the French Government is based clearly and precisely on the Norwegian and French Declarations under Article 36, paragraph 2, of the Statute. In these circumstances the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case has been presented by both Parties to the Court."

In paragraph 3A of the French Annex it is said that the Court in the case of *Certain Norwegian Loans* "had to settle" this point, that is to say the availability at that time of the General Act as between Norway and France. It is however quite plain from the Court's Judgment in that case that it did not have to settle the point but that it accepted that the General Act was a treaty in force at that time between Norway and France. It is not, as the French Annex suggests, "difficult to believe that the Court would have so summarily excluded this ground of its competence if it had provided a manifest basis for taking jurisdiction". The passage which I have quoted from the Court's Judgment clearly expresses the reason for which the Court did not seek to place its jurisdiction upon the

General Act.

58 The Act was also treated as being in force in the arbitration proceedings and in the proceedings in this Court in connection with the *Temple of Preah Vihear case Cambodia v. Thailand* (see for example, **I.C.J. Reports 1961**, at pp. 19 and 23). The availability of the General Act in that case was disputed by Thailand and the Court found no occasion to pass upon that matter.

59 The General Act is included in numerous official and unofficial treaty lists as a treaty in force, and is spoken of by a number of governments who are parties to it as remaining in force. In 1964 the Foreign Minister of France, explaining in a written reply to a Deputy in the National Assembly why France did not join the European Treaty for the Pacific Settlement of Disputes, pointed to the existence of, amongst other instruments, the General Act to which France was a party, though the Minister mistakenly referred to it as the revised General Act.

60 However, these matters are really peripheral in the present case. The central and compelling circumstance is that neither France nor Australia had denounced the Treaty in accordance with its provisions at the date of the Application, nor had any other event occurred which according to the law of treaties had brought the General Act, as between them to an end.

61 The various arguments put forward in the French Annex denying the Court's competence to entertain the Application now need consideration. It is said that the General Act disappeared with the demise of the League of Nations because "the Act of Geneva was an integral part of the League of Nations system in so far as the pacific settlement of international disputes had necessarily in that system to accompany collective security and disarmament". If by the expression "an integral part of the League of Nations system" it is intended to convey that the General Act constitutionally or organically formed part of the Covenant of the League, or of any of its organs, the statement quite clearly is incorrect. Textually the General Act is not made to depend upon the Covenant, and the references to some of the functionaries of the League are not organic in any sense or respects, but merely provide for the performance of acts of an incidentally administrative kind. Contemporaneous expressions of those concerned with the creation of the General Act leave no doubt whatever in my mind that the General Act was not conceived as, nor intended to be, an integral or any part of the League's system, whatever might precisely be included in the use of the word "system" in this connection. See, for example, *Records of the Ninth Ordinary Session of the Assembly, Minutes of the First Committee (Constitutional and Legal Questions)*, pages 68–69 (Tenth Meeting) and pages 71 and 74 (Eleventh Meeting). At page 71 the relationship of the Act to the League, or, as it was expressed, "the constitutional role that that Act was going to fill under the League of Nations" was discussed. It was pointed out by a member of the subcommittee responsible for the draft that the Act "had been regarded as being of use in connection with the general work of the League, but it had no administrative or constitutional relation with it". Alteration to this draft was made to ensure that the Act was not "an internal arrangement within the League". It was said :

"Today the States were not proposing to create an organ of the League : the League was merely going to give those which desired them facilities for completing and extending their obligations in regard to arbitration."

62 If the expression "an integral part" means that the continued existence of the League was an express condition of the continued validity of the Act, again it seems to me it would be plainly incorrect. Nothing in the text suggests such a situation. The use of the expression "ideological integration" in the Annex seems to suggest that, because the desire to maintain peace through the Covenant and through collective security, disarmament and pacific settlement of international disputes was the ideological mainspring of the creation of the General Act, all the manifestations of that philosophy, however expressed, must stand or fall together.

63 It is true that the General Act was promoted by the League, that its preparation in point of time was related to endeavours in the fields of collective security and disarmament. It is true that it was hoped that the cause of peace would be advanced by continuing action in each of the various fields. But in my view, quite clearly the General Act was conceived as a model treaty outside the Covenant of the League, available to non-members of the League and, by accession of at least two States, self-operating.

64 It is perhaps worth observing at this point that the Statute of the Permanent Court of International Justice, not an organ of the League, at that time provided its own system of pacific settlement of legal disputes by means of the optional compulsory jurisdiction in Article 36 (2) of the Statute of the Permanent Court. No doubt, like the Covenant itself, the inception of the General Act owed much to the pervading desire in the period after the conclusion of World War I to prevent, if at all possible, the repetition of that event. Though conceived at, or about the same period, and though all stemmed from the over-riding desire to secure international peace, these various means, the activities of the Council of the League, disarmament, collective security and the pacific settlement of disputes, were in truth separate paths thought to be leading to the same end, and thus in that sense complementary ; but the General Act was not dependent upon the existence or continuance of any of the others.

65 Emphasis is laid in the French Annex on the use of the organs of the League by some of the Articles of the General Act.

66 It seems to me that what the Court said in the *Barcelona Traction, Light and Power Company, Limited* case (*Belgium v. Spain*) in relation to the Hispano-Belgian Treaty of 1927, a treaty comparable to the General Act, is quite applicable to the relationship of the reference to the functionaries of the League in the General Act to its validity :

“An obligation of recourse to judicial settlement will, it is true, normally find its expression in terms of recourse to a particular forum. But it does not follow that this is the essence of the obligation. It was this fallacy which underlay the contention advanced during the hearings, that the alleged lapse of Article 17 (4) was due to the disappearance of the ‘object’ of that clause, namely the Permanent Court. But that Court was never the substantive ‘object’ of the clause. The substantive object was compulsory adjudication, and the Permanent Court was merely a means for achieving that object. It was not the primary purpose to specify one tribunal rather than another, but to create an obligation of compulsory adjudication. Such an obligation naturally entailed that a forum would be indicated ; but this was consequential.

If the obligation exists independently of the particular forum (a fact implicitly recognized in the course of the proceedings, inasmuch as the alleged extinction was related to Article 17 (4) rather than to Articles 2 or 17 (1)), then if it subsequently happens that the forum goes out of existence, and no provision is made by the parties, or otherwise, for remedying the deficiency, it will follow that the clause containing the obligation will for the time being become (and perhaps remain indefinitely) inoperative, i.e., without possibility of effective application. But if the obligation remains substantively in existence, though not functionally capable of being implemented, it can always be rendered operative once more, if for instance the parties agree on another tribunal, or if another is supplied by the automatic operation of some other instrument by which both parties are bound. The Statute is such an instrument, and its Article 37 has precisely that effect.” (*I.C.J. Reports 1964*, p. 38.)

67 I make this quotation at length at this time because we are here concerned with the question as to the continued operation of Chapter II of the General Act. In that chapter the only reference to the League or to any of its functionaries is the reference to the Permanent Court of International Justice, itself not an organ of the League. But there are references in other chapters of the General Act to functionaries of the League. These, in my opinion, are merely in respect of incidentally

administrative functions and not in any sense basic to the validity of the General Act itself. In Chapter I of the General Act the only references to the League or its functionaries are to be found in Articles 6 and 9. Reference to the Acting President of the League in Article 6 is in the alternative. Paragraph 2 of that Article provides further means of appointment of commissions. The place of meeting of commissions was in the hands of the parties, it not being obligatory or indispensable to sit at the seat of the League. Thus Articles 6 and 9 did not render Chapter I inoperative with the demise of the League. It should also be observed that though accession had been to Chapters I and II, Article 20 removed disputes as to legal rights from the operation of Chapter I.

68 So far as Chapter IV is concerned, the reference to the Permanent Court of International Justice in Articles 31, 33, 34 (b), 37 and 41 would be taken up as between France and Australia by means of Article 37 of the Statute of the Court; as far as the Registrar of the Permanent Court is concerned, by United Nations resolution 24 (1) of 12 February 1946 and the resolution of the League of Nations of 18 April 1946. Articles 43 and 44 of the General Act have been fulfilled and denunciation under Article 45 could always be effected by a direct communication between parties or by the use of the Secretary-General of the United Nations relying on the resolutions to which I have just referred, as France and the United Kingdom found no difficulty in doing in their communications to the Secretary-General in this year.

69 It can, however, properly be said that for lack of the personnel of the League, Chapter III of the General Act, relating to arbitration, may not have been capable of being fully operated after the demise of the League. But this inability to operate a part of the General Act did not render even that part, in my opinion, invalid.

70 The General Act itself indicates that specific parts or a combination of its parts of the Act were intended to be severable, and to be capable of validity and operation independently of other parts, or combinations of parts. States acceding to the General Act were not required to accede to the Act as a whole but might accede only to parts thereof (see Art. 38).

71 I can find no warrant whatever for the view that in acceding to the General Act the States doing so conditioned their accession on the continued existence of the League, or of any of its organs or functionaries, however much for convenience in carrying out their major agreement as to pacific settlement of disputes it may have been found convenient to utilize the functionaries or organs of the League for incidental purposes.

72 In the language of the Court in the *Barcelona Traction, Light and Power Company, Limited* case (**I.C.J. Reports 1964**, p. 38), "the end" sought by the Parties so far as Chapter II of the General Act was concerned was "obligatory judicial settlement"-all else was but means of effecting that major purpose.

73 Chapter II thus is in no way dependent on the continued availability of the Permanent Court of International Justice or of the Secretary or any other functionary of the League. As between Members of the United Nations, the resolutions of the United Nations and the League of Nations, to which I have previously referred, render the Secretary-General of the United Nations available.

74 I now turn to the suggestion that in some way the resolution of the General Assembly of 28 April 1949, 268A (III), instructing the Secretary-General to prepare a revised text of the General Act, including the amendments indicated in the resolution, and to hold that text open to accession by States under the title "Revised General Act for the Pacific Settlement of International Disputes", acknowledged the disappearance of the General Act as at that date or caused that Act at that time to cease to be valid.

75 It is important, I think, to indicate what effect in truth the disappearance of the League had on the General Act. In the first place, the General Act then became a closed treaty in the sense that it had been open for accession only by Members of the League and by such non-member States to

whom the Council of the League had communicated a copy of the Act. Accepting the view that a State which had been a Member of the League would have been able to accede to the General Act after the demise of the League, nonetheless the General Act could properly then be called a closed treaty. There were many States who were either then, or could likely become, Members of the United Nations which could not qualify for accession to the General Act. In this way it lacked that possible universality, though not exclusivity, which had been one of its merits at the time of its creation. Also, some of the 20-odd States who were parties to the General Act were not members of the United Nations and thus did not have the benefit of Article 37 of the Court's Statute. Further, as I have already pointed out, Chapter III (Arbitration) was not capable of being fully operated for want of the functionaries of the League. Bearing in mind the severability of the parts of the General Act to which I have already referred, the precise terms of Chapters I, II and IV of the General Act and the effect of Article 37 of the Court's Statute, as its operative extent was fully disclosed by the decision of the Court in the *Barcelona Traction, Light and Power Company, Limited* case (*supra*), the demise of the League thus left the provisions for the judicial settlement of legal disputes fully operative between those who had acceded to the General Act and who were Members of the United Nations, but settlement of disputes by arbitration under its terms may not have been any longer available to those States.

76 This state of affairs is adequately and properly described in the recitals to the General Assembly's resolution of 28 April 1949 :

“The efficacy of the General Act of 26 September 1928 for the Pacific Settlement of International Disputes is impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared.”

This recital treats the settlement by conciliation, legal process and arbitration in the one description without differentiation. The choice of the word “efficacy” which is in contrast to “validity” and of the word “impaired” is accurate in the description of the effect of the demise of the League of Nations on the General Act. The language of this recital is closely akin to the language of this Court in the passage from the *Barcelona Traction, Light and Power Company, Limited* case (*supra*) which I have quoted earlier in this opinion.

77 It was to enable the substantive provisions of the General Act to be operated to their full efficacy that the Revised General Act was proposed. The General Assembly could not have destroyed the General Act : it had no authority so to do. That was a matter exclusively for the parties to the treaty. In any case the General Assembly was hardly likely to do so, there being more than 20 parties to the General Act and no certainty as to the extent of the accession to a new treaty. The problem before the Assembly, I think, was twofold. First of all, it wanted to have a General Act in the substantive terms of the 1928 Act, all the parts of which would be capable of being fully operated. Secondly, it wanted to enable an enlargement of accession to it. It desired to restore its possible universality whilst not making it an exclusive means of the settlement of disputes (see Art. 29). The enlargement of the area of accession to a multilateral treaty has given difficulty ; and it has only been found possible to do so otherwise than by acts of parties in the case of a narrow group of treaties of a non-political kind. But by producing a new treaty, with its own accession clause, the Assembly was able to open a General Act to all Members of the United Nations or to such other States not members of the United Nations to whom a copy of the General Act should be communicated. Also those who had acceded to the General Act were enabled, if they so desired, to widen their obligations by acceding to the Revised Act and to obtain access to a fully operable provision as to arbitration. On the other hand, they could be content with the reduced efficacy (which relates only to Part III) but continuing validity of the Act of 1928.

78 The Revised Act was a new and independent treaty, though for drafting purposes it referentially incorporated the provisions of the Act of 1928 with the stated amendments. These amendments included an express provision for the substitution of the International Court of Justice

for the Permanent Court of International Justice. This is indicative of the fact that there may have been some doubt in the minds of some at the time as to the full efficacy of Article 37 of the Court's Statute, and that the Assembly was conscious that all the signatories to the General Act were not members of the United Nations, having the benefit of Article 37.

79 In my view, the resolution of the General Assembly of 28 April 1949 affirms the validity of the General Act of 1928 and casts no doubt upon it, though it recognizes that portion of it may not be fully operable. It recognized that the General Act of 1928 remained available to the parties to it in so far as it might still be operative. These words, of course, when applied to an analysis of the General Act of 1928, clearly covered Chapter II as being an area in respect of which the General Act remained fully operative, in the case of Members of the United Nations, having regard to Article 37 of the Court's Statute and the resolutions of the League of Nations and the United Nations in 1946.

80 The question was raised as to why so few of those who had acceded to the General Act acceded to the Revised General Act. This consideration does not, of course, bear on the validity of the General Act : but as a matter of interest it may well be pursued. Two factors seem to me adequately to explain the circumstances without in any way casting doubt on the validity of the General Act. As I have pointed out, the General Act of 1928, after the demise of the League, became a closed treaty, that is to say, each State which had acceded to the Act then knew with certainty towards whom it was bound. The remote possibility that a former Member of the League might still accede to the General Act does not really qualify that statement. To accede to the Revised General Act opened up the possibility of obligations to a vastly increased and increasing number of States under the new General Act. This feature of a treaty such as the General Act was observed before in the *travaux préparatoires* (see p. 67 of the Minutes to which I have already referred).

81 The second factor was that each State party to the General Act and not acceding to the new Act was to an extent freed of the demands of the arbitration procedure. It is one thing to be bound to litigate legal disputes before the Court: quite another to be bound to arbitrate other disputes on the relatively loose basis of arbitration under the General Act, *aequo et bono*.

82 The mood of the international community in 1949 was vastly different to the mood of the community in the immediately post-World War I period in relation to the pacific settlement of disputes. More hope was probably seen in the United Nations itself and the existence of the optional clause with its very flexible provisions as to reservations. The latter was no doubt seen by some as preferable to the more rigid formulae of a treaty such as the General Act.

83 I therefore conclude that so far from casting doubt on the continued validity of the General Act of 1928, the resolution of the General Assembly of 28 April 1949 confirmed the continuing validity of the General Act. The resolution did not, as the French Annex asserts, "allow for the eventuality of the Act's operating if the parties agreed to make use of it". It did not call for a reaffirmation of the treaty. The resolution makes it quite clear, to my mind, that it made no impact on the General Act of 1928, but by providing a new treaty it did afford a widened opportunity to a wider group of States to become bound by the same substantive obligations as formed the core of the General Act of 1928.

84 Some point is made in the Annex of the Australian reservations to its accession to the General Act. Of the reservations made by Australia upon its accession to the General Act the French Annex selects first that reservation which relates to the "non-application or suspension" of Chapter II of the General Act with respect to any dispute which has been submitted to, or is under consideration by, the Council of the League of Nations. It is said that with the disappearance of the League this reservation introduces such uncertainty into the extent of Australia's obligations under the Act as to give an advantage to Australia not enjoyed by other accessionaries to the Act. But in the first place it seems to me that the disappearance of the possibility that there should be a matter under the consideration of the Council of the League could have no effect, either upon validity of the

Australian accession or upon the extent of the obligations of any other accessionary. The operation of the reservation is reciprocal and the disappearance of the Council of the League simply meant that there could be no case for resort to this reservation. The making of the reservation rather emphasized the independence of the General Act from the activities of the League. Only such a reservation would involve the one in the other : and then only to the extent of the subject-matter of the reservation.

85 The other reservation made by Australia upon which the French Annex fastens is the exclusion of disputants, parties to the General Act, who are not members of the League of Nations. This is said to have acquired quite an ambiguous value because no country can be said now to be a Member of the League of Nations, but it is clear from the decision of this Court in the *South West Africa cases (Preliminary Objections, Judgment, I.C.J. Reports 1962)* that the description "Member of the League of Nations" is adequate to describe a State which has been a Member of the League. Again the very making of these reservations by some accessionaries to the General Act emphasizes its independence of the League of Nations and of its "system". There can be no uncertainty in the matter because the Court exists and by its decision can remove any dubiety which might possibly exist, although I see none.

86 I find no substance in the suggestion that "unacceptable advantages" would result for Australia from a continuance in force of the General Act, and in any case would not be willing to agree that any such result would affect the validity of the General Act.

87 It is then said that Australia had patently violated the General Act by attempting in 1939 to modify its reservations otherwise than in accordance with Article 45. This objection is based on the fact that on 7 September 1939 Australia notified the Secretary-General of the League of Nations that "it will not regard its accession to the General Act as covering or relating to any dispute arising out of events occurring during the present crisis. Please inform all States Parties to the Act". This notification could not be immediately operative because it was made at an inappropriate time ; the current period of the duration of the General Act expired in August 1940. Thus the Australian notification would not operate instanter. It had effect if at all only at the end of the five-year period next occurring after the date of the notification. What was thought to be the irregularity of giving this notification at the time it was given was observed upon by some States party to the General Act, but none, including France, made it the occasion to attempt to terminate the Act. However, nothing turns on the circumstance that there was no immediate operation of the notification and I cannot find any relevance to the problem with which the Court is now faced of the fact that Australia took the course it did in 1939.

88 It is next said that the conduct of the two States since the demise of the League is indicative of the lapse of the General Act. Neither have resorted to it. In the first place it is not shown that any occasion arose, as between France and Australia, for resort to the provisions of the General Act until the present dispute arose. Thus it is not the case of States having reason to resort to the provisions of the treaty and bypassing or ignoring its provisions by mutual consent or in circumstances from which a termination by mutual consent could be inferred. A treaty such as the General Act does not require affirmation or use to maintain its validity. It is denunciation which is the operative factor. Also it is not true to say that there has been utter silence on the part of States accessionary to the General Act, in the period since the demise of the League. I have already remarked for instance on the references to the Act by the representative of France. Nor upon the material produced could it be said that France and Australia at any time, by inactivity, tacitly agreed to terminate the General Act as between themselves.

89 I turn now to a different matter put forward in the Annex. The French Annex suggests either that the reservation of 20 May 1966 to the declaration by France to the optional compulsory clause (Art. 36 (2)) operated as itself a reservation under the General Act or that though not such a reservation it superseded and nullified France's obligations under the General Act. These seem to be

propositions alternative to the major statement in the Annex which was that the General Act because of nonuse and, as it was said, desuetude was precluded from being allowed to prevail over the expression of France's will in the reservation of 20 May 1966.

90 I need not say more as to the argument as to desuetude than that there is in my opinion no principle that a treaty may become invalid by "desuetude" though it may be that the conduct of the parties in relation to a treaty, including their inactivity in circumstances where one would expect activity, may serve to found the conclusion that by the common consent of the parties the treaty has been brought to an end. But as I have said there is nothing whatever in the information before the Court in this case which in my opinion could found a conclusion that France and Australia mutually agreed tacitly to abandon the treaty. The French Annex concedes that lapse of time will not itself terminate a treaty, for the Annex says: "the antiquity of a text was clearly not regarded in itself as an obstacle to its (i.e., the treaty) being relied on ..." Also I have indicated the extent to which the treaty had in fact been called in aid by other parties including France and to the fact that there is no evidence of an occasion when the treaty could have been used between France and Australia and was not used.

91 I would now say something as to the effect claimed by France for the reservation of 20 May 1966. At the outset, it is to my mind clear that the system of optional declaration to the compulsory jurisdiction of the Permanent Court of International Justice, and latterly to the jurisdiction of this Court, was, and was always conceived to be, a completely independent system or avenue of approach to the Court for the settlement of legal disputes to that which may be provided by treaty-bilateral or multilateral. The jurisdiction under Article 36 (1), which included treaty obligations to accept the Court's jurisdiction, and that under Article 36 (2) are separate and independent. The General Act was in fact promoted by the League of Nations at a time when Article 36 (2) of the Statute of the Permanent Court was in operation. Thus the system of optional declaration to the compulsory jurisdiction is regarded as quite separate from, and independent of, the provisions of the General Act of 1928.

92 There are notable differences between the two methods of securing pacific settlement of legal disputes: and it must always be remembered that the General Act was not confined to the settlement of legal disputes by the Court. The General Act had a term or rather, recurrent terms, of years. In default of denunciation the treaty renewed automatically: it was tacitly renewed. Reservations might only be made on accession. If further reservations are subsequently notified, they may be treated as a denunciation or may be accepted by other States parties to the Act. Thus they become consensually based. Permissible reservations are exhaustively categorized and closely circumscribed in content. Reservations might be abandoned in whole or in part. The scope of the reservations, if in dispute, is to be determined by the Court (see Arts. 39, 40 and 41 of the General Act).

93 In high contrast a declaration to Article 36 (2) of the Statute of the Court (the text and the enumeration of the Article was the same in the Statute of the Permanent Court of International Justice) need not be made for any term of years. No limitation is placed by the Statute on the nature and extent of the reservations which can be made, though the jurisprudence of the Court would seem to require them to be objective and not subjective in content. Reservations might be made at any time and be operative immediately even before their notification to States which had declared to the jurisdiction under the Article (cf. *Right of Passage over Indian Territory, Preliminary Objections, Judgment*, **I.C.J. Reports** 1957, p. 125). Further, though by declaration to the compulsory jurisdiction under the Article, States might be brought into contractual relationships with each other, such declarations do not create a treaty. Each declarant State becomes bound to accept the jurisdiction of the Court if invoked by another declarant State in a matter within the scope of Article 36 (2) and not excluded by reservation.

94 The jurisdiction under Article 36 (2) could only be invoked by a Member of the United Nations,

whereas the General Act had been open to States which were not members of the League of Nations.

95 In the light of these notable differences between the two methods of providing for judicial settlement of international legal disputes, I can see many objections to the proposition that a declaration with reservations to the optional clause could vary the treaty obligations of States which were parties to the General Act. Bearing in mind the readiness with which reservations to the declaration to the compulsory jurisdiction of the Court under Article 36 (2) could be added, terminated or varied, acceptance of the proposition that such a reservation could vary or bring to an end the obligations in a treaty would mean that there would be little value as between Members of the United Nations in a treaty which could be varied or terminated at the will of one of the parties by the simple device of adding a destructive reservation operating instantaneously to its declaration to the compulsory jurisdiction of the Court. This would be a cataclysmic inroad on the accepted view of the law of treaties which does not permit a unilateral termination or variation of a treaty except in accordance with its terms. Termination by occurrences which affect the mutual consent of the parties to the treaty, which include those on which a treaty is conceived by the mutual will of the parties to have been intended to come to an end, emphasizes the essentially consensual basis of termination or variation.

96 Also, when the differences in the provisions of Article 36 and those of the General Act relating to the making of reservations are closely observed, it will be seen that, whilst given the same description "reservation", those for which the General Act provides appear to be of a different order to those which are permissible under the Article. The purpose of providing for reservations, it seems to me, is different in each case.

97 Reservations for which a treaty provides are essentially based on consent either because within the treaty provisions as permissible reservations, as for example, in Article 39 of the General Act or because they are accepted by the other party to the treaty—see generally Part 2, section 2, of the Vienna Convention on the Law of Treaties. In the case of the General Act, the reservation falling within one of the classifications of Article 39, not made on accession, sought to be added by way of partial denunciation under Article 45 (4), can only be effective with respect to any accessionary to the General Act, if accepted by that State. It cannot in any case operate until at least six months from its notification (see Art. 45 (2)).

98 Again, in high contrast, a reservation to a declaration under the optional clause, is a unilateral act, can be made at any time, operate instantaneously, even before notification to other declarants to the optional clause and is not limited by the Statute as to its subject-matter, for the reason no doubt that the whole process under the article is voluntary. The State may abstain altogether or accept the jurisdiction to any extent and for any time. This "flexibility" of the system of optional compulsory jurisdiction may in due course increasingly bring that system into disfavour as compared with a more certain and secure regime of a treaty. But be that as it may, the brief comparison I have made, which is not intended to be exhaustive, emphasizes the irrelevance to the treaty of reservations made to a declaration under the optional clause.

99 I should also point out that the reservation of 20 May 1966 did not in any way conform to the requirements of the General Act. It is worth observing that Article 17 of the General Act requires submission to the Court of all disputes *subject to any reservation which may be made under Article 39*. The reservation of 20 May 1966 was not made under that Article: it was not made at a time when reservations could be made. It purported to operate immediately. It was not intended to be notified to members bound by the General Act. I doubt whether it is a reservation of a kind within any of the categories listed in Article 39 (2) of the General Act. It clearly could not fall within paragraphs (a) or (b) of that subclause, and it does not seem to me that it could fall within paragraph (c). Because of the complete independence of the two means of providing for the resolution of international legal disputes, I can see no reason whatever on which a reservation to a

declaration to the optional compulsory jurisdiction under Article 36 (2) could be held to operate to vary the treaty obligations of such a treaty as the General Act.

100 Apparently realizing the unacceptable consequences of the proposition that the obligations of a treaty might be supplanted by a reservation to a declaration to the optional clause, the French Annex seeks to limit its proposition to the General Act which, it claims, is :

“... not a convention containing a clause conferring jurisdiction on the Court in respect of disputes concerning the application of its provisions, but a text the exclusive object of which is the peaceful settlement of disputes, and in particular judicial settlement”.

This statement seems to have overlooked the provisions of Article 41 of the General Act and, in any case, I am unable to see any basis upon which the position as to the effect of a reservation to a declaration to the optional clause can be limited as proposed.

101 It is also said that the declaration to compulsory jurisdiction under Article 36 (2) was an act in the nature of an agreement relating to the same matter as that of the General Act. As I have already pointed out, a declaration to compulsory jurisdiction is not an agreement though it can raise a consensual bond. In any case, the subject-matter of the General Act and that of declaration to the optional clause, are not identical.

102 There is a suggestion in the French Annex that because States bound by the General Act who have also declared to the optional compulsory jurisdiction of the Court from time to time have kept the text of their respective reservations under the Act and under the optional clause conformable to each other, a departure from this “parallelism” either indicates a disuse of the General Act or requires the absence of a comparable reservation to the General Act to be notionally supplied. But the suggested parallelism did not exist in fact, as the Australian Memorial clearly indicates (see paras. 259–277). Further, there can be no validity in the proposition that because France did not make a partial denunciation of the General Act in the terms of its reservation to its declaration under the optional clause, it should, by reason of former parallelism, be taken to have done so.

103 In sum, I am unable to accept the proposition that the reservation in the declaration of 20 May 1966 by France had any effect on the obligation of France under the General Act of 1928. Its consent to the Court's jurisdiction by accession to the General Act was untouched by the later expression of its will in relation to the optional clause. The reservation by France under Article 36 (2) is no more relevant to the jurisdiction of the Court under Article 36 (1) than was such a reservation in the *Appeal Relating to the Jurisdiction of the ICAO Council, India v. Pakistan* (**I.C.J. Reports 1972**, p. 46). There an attempt to qualify the jurisdiction derived from a treaty, by the terms of a reservation to a declaration under the optional clause, was made. The attempt failed. The Court founded its jurisdiction exclusively on the treaty provision and regarded the reservation to the declaration of the optional clause as irrelevant. See the Judgment of the Court, pages 53 and 60 of the *Reports*.

104 There may well have been an explanation why there was no attempt either on the part of France or earlier on the part of the United Kingdom to denounce the General Act when contemplating **nuclear testing** in the atmosphere of the South Pacific, whilst at the same time making what was considered an appropriate reservation to the declaration to the optional clause. I remarked earlier that the General Act had become a closed treaty. The identity of those to whom France and the United Kingdom were thereby bound was known. No doubt as of 1966 the then attitudes of those States to **nuclear testing** in the atmosphere of the South Pacific were known or at least thought to be known. On the other hand, there were States declarant to the optional clause from whom opposition to **nuclear testing** in the atmosphere at all, and particularly in the Pacific, might well have been expected. However there is not really any need for any speculation as to why denunciation was not attempted by France in 1966. It suffices from the point of view of international law that it did not do so.

105 Article 36 (1) of the Court's Statute erects the jurisdiction of the Court in respect of all matters specially provided for in treaties and conventions in force. I have so far reached the conclusion that the General Act of 1928 was a treaty or convention in force between France and Australia as at the date of the Application. I have already quoted Article 17 of the General Act, in Chapter II, dealing with judicial settlement. The second paragraph of the Article incorporates the text of Article 36 (2) of the Statute of the Permanent Court of International Justice in so far as it deals with the subject-matters of jurisdiction. Thus all "legal disputes concerning : (a) the interpretation of a treaty ; (b) any question of international law ; (c) the existence of any fact which, if established, would constitute a breach of international obligation ; ..." are included in the scope of Article 17.

106 The question, then, in respect of Article 36 (1) is : what are the matters specially provided for in the General Act which are referred to the Court? They are, in my view, so far as presently relevant, each dispute with regard to which the parties are in conflict as to their respective rights, and legal disputes concerning any question of international law or the existence of any fact, which, if established, would constitute a breach of an international obligation, subject, in any event, to, and, as I think, only to, any reservations which may have been made under Article 39 of the General Act.

107 It seems to me that there are two possible views as to the elements of the Court's jurisdiction derived under Article 36 (1) of the Court's Statute and drawn through the General Act, Article 17 and Article 37 of the Court's Statute.

108 On the one hand, it may be said that the jurisdiction is complete if the General Act is a treaty or convention in force between France and Australia at the date of the Application. The subject-matter of the Court's jurisdiction so established would then be described as matters referred to the Court by the General Act of 1928, that is to say, disputes between States bound by the Act as to their respective legal rights, etc. Such disputes are in that view treated as the general kind of matters which the Court has authority to resolve by its judicial processes because of the continued existence of the General Act. On that view, the question whether the dispute in fact existing now between France and Australia at the date of the Application is of that kind, becomes a matter of admissibility.

109 On the other hand, the view may be taken that the necessary elements of the Court's jurisdiction are not satisfied merely by the establishment of the General Act as a treaty or convention in force between France and Australia, but require the establishment of the existence of a dispute between them as to their respective rights, etc. : that is to say the matter referred by the General Act is not a genus of dispute but specific disputes as to the rights of two States vis-à-vis one another. The States in that view are taken as consenting to the jurisdiction to hear those particular disputes. To use the language used in the case of *Ambatielos (Merits), Greece v. United Kingdom* (**I.C.J. Reports** 1953, p. 29), the dispute must fall under "the category of differences" in respect of which there is consent to the Court's jurisdiction. On this analysis, no separate question of admissibility arises ; it is all one question of jurisdiction, the existence in fact and in law of the dispute between the two States as to their respective rights being a sine qua non of jurisdiction in the Court. It is that dispute which the Court has jurisdiction to decide.

110 This is the view of the matter which I prefer. But the Court's Order of 22 June 1973 was made, apparently, on the assumption that a distinct question of admissibility arose, or at any rate could be said to arise. Accordingly, notwithstanding the opinion I have just expressed, I am prepared for the purposes of this opinion to treat the question whether the dispute between France and Australia is a dispute as to their respective rights as a question of admissibility. However, I would emphasize that, whether regarded as a necessary element of the Court's jurisdiction or as a matter of admissibility, the question, to my mind, is the same, and the substantial consequence of an answer to it will be the same whichever view is taken as between the two views I have suggested of the necessary elements of the Court's jurisdiction. That question is whether the Parties are in dispute as to their

respective rights, the word “right” connoting legal right.

111 There is therefore, in my opinion, jurisdiction to hear and determine a dispute between parties bound by the General Act as to their legal rights. As indicated I shall deal with the question of admissibility as if it were a separate question.

Admissibility

112 A distinction has been drawn in the jurisprudence of the Court between its jurisdiction in a matter and the admissibility of the reference or application made to it. The Rules of Court maintain the separateness of the two concepts (see Art. 67) but the Statute of the Court makes no reference to admissibility. In particular the default provision, Article 53, does not do so. This might be significant in a case such as the present where there has been no preliminary objection to admissibility setting out the grounds upon which it is said the Application is not admissible. The result of a strict application of Article 53 in such a case, if there has been no special Order such as the Court's Order of 22 June 1973, may be that any question of admissibility where the respondent does not appear is caught up in the consideration either of jurisdiction or of the merits of the Application. However, the Court being in control of its own procedure can, as it has done in this case, direct argument on admissibility as a separate consideration, but no doubt only to the extent to which that question can properly be said in the circumstances to be of an exclusively preliminary character.

113 It may be said that the jurisdiction of the Court relates to the capacity of the Court to hear and determine matters of a particular nature, e.g., those listed in Article 36 (2) of the Statute of the Court, whereas admissibility relates to the competence, receivability, of the reference or application itself which is made to the Court.

114 It might be said that jurisdiction in the present case includes the right of the Court to enter upon the enquiry whether or not a dispute of the relevant kind exists and a jurisdiction, if the dispute exists, to grant the Applicant's claim for its resolution by declaration and Order. If such a dispute exists, the claim is admissible.

115 An examination as to admissibility is itself an exercise of jurisdiction even though a finding as to admissibility may be a foundation for the exercise of further jurisdiction in resolving the claim. The overlapping nature of the two concepts of jurisdiction and admissibility is apparent, particularly where, as here, the existence of a relevant dispute may be seen as a prerequisite to the right to adjudicate derived from Article 17 of the General Act.

116 I observed earlier that there is no universally applicable definition of the requirements of admissibility. The claim may be incompetent, that is to say inadmissible, because its subject-matter does not fall within the description of matters which the Court is competent to hear and decide ; or because the relief which the reference or application seeks is not within the Court's power to consider or to give ; or because the applicant is not an appropriate State to make the reference or application, as it is said that the applicant lacks standing in the matter ; or the applicant may lack any legal interest in the subject-matter of the application or it may have applied too soon or otherwise at the wrong time, or, lastly, all preconditions to the making or granting of such a reference or application may not have been performed, e.g., local remedies may not have been exhausted. Indeed it is possible that there may arise other circumstances in which the reference or application may be inadmissible or not receivable. Thus admissibility has various manifestations.

117 Of course all these elements of the competence of the reference or application will not necessarily be relevant in every case. Which form of admissibility arises in any given case may depend a great deal on the source of the relevant jurisdiction of the Court on which reliance is placed and on the terms in which its jurisdiction is expressed. This, in my opinion, is the situation in this case.

Is There a dispute Between the Parties as to Their Respective Rights?

118 The Court labours under the disability that it has no formal objection to admissibility, particularizing the respect in which it is said that the Application is inadmissible. The Annex to the Ambassador's letter of 16 May 1973 in challenging the existence of jurisdiction in the Court under Article 36 (1) of the Statute, bases its objection on the lapse or qualification of the General Act and not on the absence of a dispute falling within Article 17 of the General Act. Further, there was no express reference to the admissibility of the Application.

119 It is, however, possible to construct out of the *White Book* an argument that the Application was "without object" in the sense that there were no legal norms by resort to which the dispute in fact existing between the Parties could be resolved, which is to say, though it is not expressly said, that there was no dispute between the Parties as to their respective rights (see the terms of Art. 17 of the General Act). This, it seems to me, was suggested in the *White Book* in relation to the claim that the **testing** of **nuclear** weapons had become unlawful by the customary international law. It was not, and in my opinion could not be, said that there were no legal norms by reference to which the claim for the infringement of territorial and decisional sovereignty could be determined—though important and difficult legal considerations arise in that connection, as was observed upon in the French Annex by its reference to a threshold of radio-active intrusion which should not be exceeded. In relation to the claim for breach of the freedom of the high seas and superincumbent air space, the French *White Paper* refers to international practice as justifying what was proposed to be done in relation to the area surrounding its atmospheric **testing**: but this contention is not related to admissibility.

120 An element of admissibility is the possession by the applicant State of a legal interest in the subject-matter of its Application. As it is, in my opinion, the existence of a dispute as to the respective legal rights of the Parties which must be the subject-matter of the Application in this case to satisfy Article 17, I think that upon the establishment of such a dispute each of the disputants to such a dispute must be held to have a legal interest in the resolution of the dispute. For my part, the matter of admissibility would end at the point at which it was decided that there was a dispute between France and Australia as to their respective legal rights, that is to say, that a dispute existed as to the right claimed by Australia as its right or of an obligation of France towards Australia which Australia claimed to be infringed. There is importance in the presence of the word *their* in the formula; it is to be a dispute as to *their* respective rights. That possessive pronoun embraces in my opinion the need for a legal interest in the subject-matter.

121 Thus, in my opinion, the question to be resolved at this stage of the case is whether the Parties were, at the date of the Application, in dispute as to their respective rights.

122 That these Parties are in dispute is in my opinion beyond question. It is clear that there were political or merely diplomatic approaches by the Applicant for a time; and there are political aspects of the subject-matter of the correspondence which evidences their dispute. But so to conclude does not deny that the Parties may be in dispute nonetheless about their respective rights. That question will be determined by what in substance they are in difference about.

123 The source material upon which these questions are to be resolved is the correspondence between France and Australia set out at Annexes 2 to 14 inclusive of the Application instituting the present proceedings, as explained and amplified in the submissions to the Court. The contents of and the omissions from the French Annex, which raises arguments of law in opposition to the legal propositions in the Australian Notes, ought also to be considered in this connection. Nowhere is it suggested in the Annex that the dispute between France and Australia is no more than a political difference, a clash of interest incapable of resolution by judicial process, perhaps a not unimportant circumstance.

124 I have found it important in reading the Notes exchanged between France and Australia to

differentiate the conciliatory language designed to secure, if possible French abandonment of the proposal, and the language employed when claims of right are made. The dispute between the Governments up to the stage of the change of language might possibly be characterized as chiefly political, the desired end being sought to be attained by diplomacy alone, but the language does not certainly remain so. The changed tone of the Australian Note is visible in the Note of 3 January 1973, where it is said :

“The Australian Government, which has hitherto adopted a position of considerable restraint in this matter, wishes to make quite clear its position with respect to proposed atmospheric **nuclear tests** to be conducted in the Pacific by the French Government. In the opinion of the Australian Government, the conducting of such **tests** would not only be undesirable but would be unlawful-particularly in so far as it involves modification of the physical conditions of and over Australian territory ; pollution of the atmosphere and of the resources of the seas ; interference with freedom of navigation both on the high seas and in the airspace above ; and infraction of legal norms concerning atmospheric **testing** of **nuclear** weapons.”

125 Having followed this statement with a request that the French Government refrain from further **testing**, the Australian Note proceeds :

“The Australian Government is bound to say, however, that in the absence of full assurances on this matter, which affects the welfare and peace of mind not only of Australia but of the whole Pacific community, the only course open to it will be the pursuit of appropriate international legal remedies.”

The Applicant thus raised claims of legal right.

126 In its Note in reply, the French Government first of all applied itself to a justification of its decision to carry out **nuclear tests**, and then proceeded :

“Furthermore, the French Government, which has studied with the closest attention the problems raised in the Australian Note, has the conviction that its **nuclear** experiments have not violated any rule of international law. It hopes to make this plain in connection with the ‘infractions’ of this law alleged by the Australian Government in its Note above cited.

The first of these are said to concern the pollution and physical modifications which the experiments in question are supposed to involve for Australian territory, the sea, the airspace above.

In the first place, the French Government understands that the Australian Government is not submitting that it has suffered damage, already ascertained, which is attributable to the French experiments.

If it is not to be inferred from damage that has occurred, then the ‘infraction’ of law might consist in the violation by France of an international legal norm concerning the threshold of atomic pollution which should not be crossed.

But the French Government finds it hard to see what is the precise rule on whose existence Australia relies. Perhaps Australia could enlighten it on this point.

In reality, it seems to the French Government that this complaint of the violation of international law on account of atomic pollution amounts to a claim that atmospheric **nuclear** experiments are automatically unlawful. This, in its view, is not the case. But here again the French Government would appreciate having its attention drawn to any points lending colour to the opposite opinion.

Finally, the French Government wishes to answer the assertion that its experiments would unlawfully hamper the freedom of navigation on the high seas and in the airspace above.

In this respect it will be sufficient for the French Government to observe that it is nowadays usual for areas of the high seas to be declared dangerous to navigation on account of explosions taking place there, including the firing of rockets. So far as **nuclear** experiments are concerned, the Australian Government will not be unaware that it was possible for such a danger-zone encroaching on the high seas to be lawfully established at the time of previous experiments."

This note disputes those claims of legal right.

127 The Australian Note of 13 February 1973 contains the following passages :

"The Australian Government assures the French Government that the present situation, caused by an activity which the French Government has undertaken and continues to undertake and which the Australian Government and people consider not only illegitimate but also gravely prejudicial to the future conditions of life of Australia and the other peoples of the Pacific ..."

and again :

"It is recalled that, in its Note dated 3 January 1973, the Australian Government stated its opinion that the conducting of atmospheric **nuclear tests** in the Pacific by the French Government would not only be undesirable but would be unlawful. In your Ambassador's Note dated 7 February 1973 it is stated that the French Government, having studied most carefully the problems raised in the Australian Note, is convinced that its **nuclear tests** have violated no rule of international law. The Australian Government regrets that it cannot agree with the point of view of the French Government, being on the contrary convinced that the conducting of the **tests** violates rules of international law. It is clear that in this regard there exists between our two Governments a substantial legal dispute."

Was this conclusion of the Australian Government thus expressed warranted, and if it was does it satisfy the question as to whether there was a dispute of the required kind, the Application being in substance for a settlement of that dispute by means of a declaration by the Court that the rights which were claimed do exist and that they have been infringed?

128 It is quite evident from the correspondence that at the outset the hope of the Australian Government was that France might be deterred from making or from continuing its **nuclear test** experiments in the South Pacific by the pressure of international opinion and by the importance of maintaining the undiminished goodwill and the economic co-operation of Australia. In the period of this portion of the correspondence, and I set that period as between 6 September 1963 and 29 March 1972, the emphasis is upon the implications of the partial **Nuclear Test Ban Treaty** of 1963, the general international opinion in opposition to **nuclear** atmospheric **tests** and the importance of harmonious relations between Australia and France as matters of persuasion.

129 But in January 1973, when it is apparent that none of these endeavours have been or are likely to be successful, and it is firmly known that a further series of **tests** will be undertaken by France in the mid-year, that is to say, in the winter of the southern hemisphere, the passages occur which I have quoted from the Note of 3 January 1973 and the response of the French Government of 7 February 1973 which respectively raise and deny the Applicant's claim that its legal rights will be infringed by further **testing** of **nuclear** devices in the South Pacific.

Four Bases of Claim

130 It is apparent from the passages which I have quoted that the various bases of illegality which

the Applicant has put before the Court in support of its present Application were then nominated. They can be extracted and listed as follows :

- (1) unlawfulness in the modification of the physical conditions of the Australian territory and environment ;
- (2) unlawfulness in the pollution of the Australian atmosphere and of the resources of its adjacent seas ;
- (3) unlawfulness in the interference with freedom of navigation on sea and in air ; and
- (4) breach of legal norms concerning atmospheric **testing** of **nuclear** weapons.

None of these were conceded by France and indeed they were disputed.

131 It might be observed at this point that there is a radical distinction to be made between the claims that violation of territorial and decisional sovereignty by the intrusion and deposition of radio-active nuclides and of pollution of the sea and its resources thereby is unlawful according to international law, and the claim that the **testing** of **nuclear** weapons has become unlawful according to the customary international law, which is expressed in the Australian Note of 3 January 1973 as “legal norms concerning atmospheric **testing** of **nuclear** weapons”.

132 In the first instance, it is the intrusion of the ionized particles of matter into the air, sea and land of Australia which is said to be in breach of its rights sustained by international law. It is not fundamentally significant in this claim that the atomic explosions from which the ionized particles have come into the Australian environment were explosions for the purpose of developing **nuclear** weapons, though in fact that is what happened.

133 But in the second instance the customary law is claimed now to include a prohibition on the **testing** of **nuclear** weapons. The particular purpose of the detonations by France is thus of the essence of the suggested prohibition. Though, as I will mention later, the Applicant points to the resultant fall-out in Australia, these consequences are not of the essence of the unlawfulness claimed : it is the **testing** itself which is claimed to be unlawful.

134 It might be noticed that the objection to the **testing** of **nuclear** weapons in international discussions is placed on a twofold basis : there is the danger to the health of this and succeeding generations of the human race from the dissemination of radio-active fall-out, but there is also the antipathy of the international community to the enlargement of the destructive quality of **nuclear** armaments and to the proliferation of their possession. Thus, it is not only **nuclear** explosions as such which are the suggested objects of the prohibition, but the **testing** of **nuclear** weapons as an adjunct to the increase in the extent of **nuclear** weaponry.

135 The order in which these four bases of claim were argued and the emphasis respectively placed upon them has tended to obscure the significance of the Applicant's claim for the infringement of its territorial and decisional sovereignty. Because of this presentation and its emotional overtones it might be thought that the last of the above-enumerated bases of claim which, I may say, has its own peculiar difficulties, was the heartland of the Australian claim. But as I understand the matter, the contrary is really the case. It is the infraction of territorial sovereignty by the intrusion and deposition of nuclides which is the major basis of the claim.

136 A dispute about respective rights may be a dispute between the Parties as to whether a right exists at all, or it may be a dispute as to the extent of an admitted right, or it may be a dispute as to the existence of a breach of an admitted right, or of course it may combine all these things, or some of them, in the one dispute. The claim on the one hand and the denial on the other that a right exists or as to its extent or as to its breach constitute, in my opinion, a dispute as to rights. If such a dispute between the Parties is as to their respective rights it will in my opinion satisfy the terms of

Article 17 of the General Act which, in my opinion, is the touchstone of jurisdiction in this case or, if the contrary view of jurisdiction is accepted, the touchstone of admissibility.

137 If the dispute is not a dispute as to the existence of a legal right, it will not satisfy Article 17 and it may be said to be a dispute “without object” because, if it is not a dispute as to a legal right, the Court will not be able to resolve it by the application of legal norms: the dispute will not be justiciable.

138 But such a situation does not arise merely because of the novelty of the claim of right or because the claimed right is not already substantiated by decisions of the Court, or by the opinions of learned writers, or because to determine its validity considerable research and consideration must be undertaken.

139 In his separate opinion in the case of the *Northern Cameroons (supra)*, Sir Gerald Fitzmaurice adopted as a definition of a dispute which was necessary to found the capacity of this Court to make a judicial Order the definition which was given by Judge Morelli in his dissenting opinion in the *South West Africa case (Jurisdiction, I.C.J. Reports 1962, between pp. 566 and 588)*, Sir Gerald, adding an element thereto drawn from the argument of the Respondent in the case of the *Northern Cameroons* (see pp. 109–110 of *I.C.J. Reports 1963*).

140 Sir Gerald thought that there was no dispute in that case (though the Court, including Judge Morelli, considered there was) because the Court could not in that case make any effective judicial Order about the matter in respect of which the Parties to the case were in difference. On page 111 of the *Reports* of the case, Sir Gerald said :

“In short, a decision of the Court neither would, nor could, affect the legal rights, obligations, interests or relations of the Parties in any way ; and this situation both derives from, and evidences, the non-existence of any dispute between the Parties to which a judgment of the Court could attach itself in any concrete, or even potentially realizable, form. The conclusion must be that there may be a disagreement, contention or controversy, but that there is not, properly speaking, and as a matter of law, any dispute.

To state the point in another way, the impossibility for a decision of the Court in favour of the Applicant State to have any effective legal application in the present case (and therefore the incompatibility with the judicial function of the Court that would be involved by the Court entertaining the case) is the reverse of a coin, the obverse of which is the absence of any genuine dispute.

Since, with reference to a judicial decision sought as the outcome of a dispute said to exist between the Parties, the dispute must essentially relate to what that decision ought to be, it follows that if the decision (whatever it might be) must plainly be without any possibility of effective legal application at all, the dispute becomes void of all content, and is reduced to an empty shell.”

141 The nub of these remarks was that, because the trusteeship agreement had come to an end, the Court could not by a decision confer or impose any right or obligation on either Party in respect of that agreement : and it was only this interpretation or application of that agreement which the Applicant sought. The qualification of a dispute which Sir Gerald imported into his definition is present, in my opinion, in the very formulation of the nature of the dispute which is relevant under Article 17, that is to say, a dispute as to the respective rights of the Parties. If the dispute is of that kind, it seems to me that the Court must be able both to resolve it by the application of legal norms because legal rights of the Parties are in question and to make at least a declaration as to the existence or non-existence of the disputed right or obligation.

142 It is essential, in my opinion, to observe that the existence of a dispute as to legal rights does

not depend upon the validity of the disputed claim that a right exists or that it was of a particular nature or of a particular extent. In order to establish the existence of a dispute it is not necessary to show that the claimed right itself exists. For example, a party who lost a contested case in a court of law on the ground that in truth he did not have the right which he claimed to have had against the other party, was nonetheless at the outset in dispute with that other party as to their respective rights, that is to say, the right on the one hand and the commensurate obligation on the other. The solution of the dispute by the court did not establish that the parties had not been in dispute as to their rights, though it did determine that what the plaintiff party claimed to be his right was not validly so claimed. To determine the validity of the disputed claim is to determine the merits of the application.

143 It is conceivable that a person may claim a right which, being denied, gives the appearance of a dispute, but because the claim is beyond all question and on its face baseless, it may possibly be said that truly there is no dispute because there was in truth quite obviously nothing to dispute about, or it may be said that the disputed claim is patently absurd or frivolous. But these things, in my opinion, cannot be said as to any of the bases of claim which are put forward in the Application and which were present in the correspondence which antedated it.

Consideration of Bases of Claim

144 I turn now to consider whether the several bases of claim which I have listed above are claims as to legal rights possessed by Australia, in other words, whether these bases of claim being disputed are capable of resolution by the application of legal norms and whether the Applicant has a legal interest to maintain its claim in respect of those rights.

145 In considering these questions, it must be recalled that if they are to be decided at this stage, they must be questions of an exclusively preliminary character. If, to resolve either of them, it is necessary to go into the merits, then that question is not of that character.

146 It is not disputed in the case that the deposition of radio-active particles of matter (nuclides) on Australian territory and their intrusion into the Australian environment of sea and air occurs in a short space of time after a **nuclear** explosion takes place in the French Pacific territory of Mururoa, due to the inherent nature and consequences of such explosions and the prevailing movements of air in the southern hemisphere. Thus it may be taken that that deposition and intrusion is caused, and that it is known that it will be caused, by those explosions.

First and Second Bases

147 I can take bases 1 and 2 together. Each relates to the integrity of territory and the territorial environment. The Applicant's claim is that the deposition and intrusion of the nuclides is an infringement of its right to territorial and, as it says, decisional sovereignty. It is part of this claim that the mere deposition and intrusion of this particular and potentially harmful physical matter is a breach of Australia's undoubted sovereign right to territorial integrity, a right clearly protected by international law.

148 France, for its part, as I understand the French Annex, asserts that the right to territorial integrity in relevant respects is only a right not to be subjected to actual and demonstrable damage by matter intruded into its territory and environment. Hence the reference to a threshold of **nuclear** pollution. Put another way, it is claimed that France's right to do as she will on her own territory in exercise of her own sovereign rights is only qualified by the obligation not thereby to cause injury to another State ; that means, as I understand the French point of view, not to do actual damage presently provable to the Australian territory or environment of air and sea. In such a formulation it would seem that France claims that although the nuclides were inherently dangerous, their deposition and intrusion into the Australian territory and environment did not relevantly cause damage to Australia or people within its territory. Damage in that view would not

have been caused unless some presently demonstrable injury had been caused to land or persons by the **nuclear** fall-out.

149 Such a proposition is understandable, but it is a proposition of law. It is disputed by Australia and is itself an argument disputing the Australian claim as to the state of the relevant law. So far as the question of French responsibility to Australia may depend upon whether or not damage has been done by the involuntary reception in Australia of the radio-active fall-out, it should be said that the question whether damage has in fact been done has not yet been fully examined. Obviously such a question forms part of the merits. Again, if there is no actual damage presently provable, the question remains whether the nuclides would in future probably or only possibly cause injury to persons within Australian territory ; and in either case, there is a question of whether the degree of probability or possibility, bearing in mind the nature of the injuries which the nuclides are capable of causing, is sufficient to satisfy the concept of damage if the view of the law put forward by the French Annex were accepted. The resolution of such questions, which in my opinion are legal questions, partakes of the merits of the case.

150 The French *White Book* appears to me to attribute to the Applicant and to New Zealand in its case, a proposition that :

“... they have the right to decline to incur the risks to which **nuclear** atmospheric **tests** would expose them, and which are not compensated for by advantages considered by them to be adequate, and that a State disregarding this attitude infringes their sovereignty and thus violates international law”.

151 I do not apprehend that the Applicant did put forward that view of the law ; and as phrased by the French *White Book*, it is a proposition of law. My understanding of the Applicant's argument was that the Applicant claimed that in the exercise of its sovereignty over its territory it had to consider, in this technological age, whether it would allow radio-active material to be introduced into and used in the country. It claims that it alone should decide that matter. As some uses of such material can confer benefit on some persons, it was said that Australia had established for itself a rule that it would not allow the introduction into, or the use of radio-active material in Australia unless a benefit, compensating for any harmful results which could come from such introduction or use, could be seen. In assessing the benefit and the detriment, account had to be taken of the level of radio-activity, natural and artificial, which existed at any time in the environment. It was said, as I followed the argument, that the involuntary receipt into the territory and environment of radio-active matter infringed Australian sovereignty and compromised its capacity to decide for itself what level of radio-activity it would permit in the territory under its sovereignty. As the introduction was involuntary, no opportunity was afforded of considering whether the introduction of the radio-active matter had any compensating benefits. This was the infringement of what the Applicant called its decisional sovereignty. But if I be wrong in my understanding of the Australian position in this respect, and the French view is the correct one, the Parties are in dispute about a further aspect of international law affecting their relations with one another.

152 Thus France and Australia are, in my opinion, in difference as to what is the relevant international law regulating their rights and obligations in relation to the consequences on Australian territory or in its environment of **nuclear** explosions taking place on French territory. To borrow an expression from municipal law, one, but not the only, aspect of the dispute is whether actual and demonstrable damage is of the “gist” of the right to territorial integrity or is the intrusion of radio-active nuclides into the environment *per se* a breach of that right.

153 In resolving the question whether damage is of the essence of the right to territorial integrity in relation to the intrusion of physical matter into territory, there may arise what is a large question as to the classification of substances which may not be introduced with impunity by one State on to and into the territory and environment of another. Is there a possible limitation or qualification of the right to territorial and environmental integrity which springs from the nature of the activity which

generates the substance which is deposited or intruded into the State's territory and environment? There are doubtless uses of territory by a State which are of such a nature that the consequences for another State and its territory and environment of such a use must be accepted by that other State. It may very well be that a line is to be drawn between depositions and intrusions which are lawful and must be borne and those which are unlawful ; on the other hand it may be that because of the unique nature of nuclides and the internationally unnecessary and internationally unprofitable activity which gives rise to their dissemination, no more need be decided than the question whether the intrusion of such nuclides so derived is unlawful.

154 It is important, in my opinion, to bear in mind throughout that we are here dealing with the emission and deposit of radio-active substances which are in themselves inherently dangerous. There may be differences of opinion as to how dangerous they may prove to be, but no dissent from the view that they are intrinsically harmful and that their harmful effect is neither capable of being prevented nor, indeed, capable of being ascertained with any degree of certainty. I mention these possibilities merely as indicating the scope of the legal considerations which the dispute of the Parties in relation to territorial sovereignty evokes.

155 In my opinion, it cannot be claimed, and I do not read the French Annex as claiming, that this difference between France and Australia as to whether or not there has been an infringement of Australian sovereignty is other than a legal dispute, a dispute as to the law and as to the legal rights of the Parties. It is a dispute which can be resolved according to legal norms and by judicial process. Clearly the Applicant has a legal interest to maintain the validity of its claim in this respect.

Third Basis of Claim

156 The third basis of the claim is that Australia's rights of navigation and fishing on the high seas and of oceanic flight will be infringed by the action of the French Government not limited to the mere publication of NOTAMS and AVROMARS in connection with its **nuclear tests** in the atmosphere of the South Pacific. Here there is, in my opinion, a claim of right. The claim also involves an assertion that a situation will exist which would be a breach of that right. It seems also to be claimed that pollution of the high seas, with resultant effects on fish and fishing, constitutes an infringement of the Applicant's rights in the sea.

157 France disputes that what it proposes to do would infringe Australia's rights in the high seas and super-incumbent air, bearing in mind established international practice. Thus the question arises as to the extent of the right of the unimpeded use of the high seas and super-incumbent air, and of the nature and effect of international practice in the closure of areas of danger during the use of the sea and air for the discharge of weapons or for dangerous experimentation.

158 Again, in my opinion, there is, in connection with the third basis of claim, a dispute as to the existence and infringement of rights according to international law: there is a dispute as to the respective rights of the Parties. On that footing, the interest of the Applicant to sustain the Application is, in my opinion, apparent.

Fourth Basis of Claim

159 The claim in relation to the **testing** of **nuclear** weapons in the atmosphere stands on a quite different footing from the foregoing. It is a claim that Australia's rights are infringed by the **testing** of **nuclear** weapons by France in the atmosphere of the South Pacific. I have expressed it in that fashion, emphasizing that it is Australia's rights which are said to be infringed, though I am bound to say that the claim is not so expressed in the Australian Note of 3 January 1973. However, the expression of the relevant claim in paragraph 49 of the Application is susceptible of that interpretation. The relevant portion of that paragraph reads :

“The Australian Government contends that the conduct of the **tests** as described above

has violated and, if the **tests** are continued, will further violate international law and the Charter of the United Nations, and, *inter alia*, Australia's rights in the following respects :

(i) The right of Australia and its people, in common with other States and their peoples, to be free from atmospheric **nuclear** weapon **tests** by any country is and will be violated ...”

160 It is clear enough, in my opinion, that the Applicant has claimed that international law *now* prohibits any State from **testing nuclear** weapons, at least in the atmosphere. Of course, Australia would have no interest to complain in this case of any other form of **testing**, the French **tests** being in the atmosphere. The claim is not that the law should be changed on moral or political grounds, but that the law now is as the Applicant claims it to be. France denies that there is any such prohibition. It can readily be said, in my opinion, that this is a dispute as to the present state of international law. It is not claimed that that law has always been so, but it is claimed that it has now become so.

161 It is said that there has been such a progression of general opinion amongst the nations, evidenced in treaty, resolution and expression of international opinion, that the stage has been reached where the prohibition of the **testing** of **nuclear** weapons is now part of the customary international law.

162 It cannot be doubted that that customary law is subject to growth and to accretion as international opinion changes and hardens into law. It should not be doubted that the Court is called upon to play its part in the discernment of that growth and in the authoritative declaration that in point of law that growth has taken place to the requisite extent and that the stretch of customary law has been attained. The Court will, of course, confine itself to declaring what the law has already become, and in doing so will not be altering the law or deciding what the law ought to be, as distinct from declaring what it is.

163 I think it must be considered that it is legally possible that at some stage the **testing** of **nuclear** weapons could become, or could have become, prohibited by the customary international law. Treaties, resolutions, expressions of opinion and international practice, may all combine to produce the evidence of that customary law. The time when such a law emerges will not necessarily be deferred until all nations have acceded to a **test** ban treaty, or until opinion of the nations is universally held in the same sense. Customary law amongst the nations does not, in my opinion, depend on universal acceptance. Conventional law limited to the parties to the convention may become in appropriate circumstances customary law. On the other hand, it may be that even a widely accepted **test** ban treaty does not create or evidence a state of customary international law in which the **testing** of **nuclear** weapons is unlawful, and that resolutions of the United Nations and other expressions of international opinion, however frequent, numerous and emphatic, are insufficient to warrant the view that customary law now embraces a prohibition on the **testing** of **nuclear** weapons.

164 The question raised by the Applicant's claim in respect of the **nuclear testing** of weapons and its denial by France is whether the stage has already been reached where it can be said as a matter of law that there is now a legal prohibition against the **testing** of **nuclear** weapons, particularly the **testing** of **nuclear** weapons in the atmosphere. If I might respectfully borrow Judge Petren's phrase used in his dissenting opinion at an earlier stage in this case, the question which arises is whether :

“... atmospheric **tests** of **nuclear** weapons are, generally speaking, already governed by norms of international law, or whether they do not still belong to a highly political domain where the norms concerning their international legality or illegality are still at the gestation stage” (*I.C.J. Reports 1973*, p. 126),

which is, in my opinion, a description of a question of law.

165 The difficulties in the way of establishing such a change in the customary international law are fairly obvious, and they are very considerable, but, as I have indicated earlier, it is not the validity of the claim that is in question at this stage. The question is whether a dispute as to the law exists. However much the mind may be impressed by the difficulties in the way of accepting the view that customary international law has reached the point of including a prohibition against the **testing** of **nuclear** weapons, it cannot, in my opinion, be said that such a claim is absurd or frivolous, or *ex facie* so untenable that it could be denied that the claim and its rejection have given rise to a dispute as to legal rights. There is, in my opinion, no justification for dismissing this basis of the Applicant's claim as to the present state of international law out of hand, particularly at a stage when the Court is limited to dealing with matters of an exclusively preliminary nature. Nor is it the case that the state of the customary law could not be determined by the application of legal considerations.

166 There remains, however, another and a difficult question, namely whether Australia has an interest to maintain an application for a declaration that the customary law has reached the point of including a prohibition against the **testing** of **nuclear** weapons.

167 In expressing its claim, it is noticeable that the Applicant speaks of its right as being a right along with all other States. It does not claim an individual right exclusive to itself. In its Memorial, it puts the obligation not to **test nuclear** weapons as owed by each State to every other State in the international community; thus it is claimed that each State can be held to have a legal interest in the maintenance of a prohibition against the **testing** of **nuclear** weapons. The Applicant, in support of this conclusion, relies upon the obiter dictum in the *Barcelona Traction, Light and Power Company, Limited* case (*Belgium v. Spain, supra, I.C.J. Reports 1970, at p. 32*) :

“When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection : they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23*) ; others are conferred by international instruments of a universal or quasi-universal character.”

168 The Applicant says that the prohibition it claims now to exist in the customary international law against the **testing** of **nuclear** weapons is of the same kind as the instances of laws concerning the basic rights of the human person as are given in paragraph 34 of the Court's Judgment in the *Barcelona Traction, Light and Power Company, Limited* case, and that therefore the obligation to observe the prohibition is *erga omnes*. The Applicant says that in consequence the right to observance of the prohibition is a right of each State corresponding to the duty of each State to observe the prohibition, a duty which the Applicant claims is owed by each State to each and every other State.

169 If this submission were accepted, the Applicant would, in my opinion, have the requisite legal

interest, the *locus standi* to maintain this basis of its claim. The right it claims in its dispute with France would be *its* right: the obligation it claims France to be under, namely an obligation to refrain from the atmospheric **testing** of **nuclear** weapons, would be an obligation owed to Australia. The Parties would be in dispute as to their respective rights.

170 But in my opinion the question this submission raises is not a matter which ought to be decided as a question of an exclusively preliminary character. Not only are there substantial matters to be considered in connection with it, but, if a prohibition of the kind suggested by the Applicant were to be found to be part of the customary international law, the precise formulation of, and perhaps limitations upon, that prohibition may well bear on the question of the rights of individual States to seek to enforce it. Thus the decision and question of the admissibility of the Applicant's claim in this respect may trench upon the merits.

171 There is a further aspect of the possession of the requisite legal interest to maintain this basis of the Applicant's claim which has to be considered. The Applicant claims to have been specially affected by the breach of the prohibition against atmospheric **testing** of **nuclear** weapons. Conformably with its other bases of claim the Applicant says that there has been deleterious fall-out on to and into its land and environment from what it claims to be the unlawful atmospheric **testing** of **nuclear** weapons. It may well be that when the facts are fully examined, this basis of a legal interest to maintain the Application in relation to the **testing** of **nuclear** weapons may be made out, both in point of fact and in point of law, but again the matter is not, in my opinion, a question of an exclusively preliminary nature.

172 In the result, I am of opinion that the Applicant's claim is admissible in relation to the first three of the four bases which I have enumerated at an earlier part of this opinion. But I am not able to say affirmatively at this stage that the Application is admissible, as to the fourth of those bases of claim. In my opinion, the question whether the Application is in that respect admissible is not a question of an exclusively preliminary nature, and for that reason it cannot be decided at this stage of the proceedings.

173 I shall add that, if it were thought, contrary to my own opinion, that the question of admissibility involved to any extent an examination of the validity of the claims of right which are involved in the dispute between the Parties, it would be my opinion that the question of admissibility so viewed could not be decided as a question of an exclusively preliminary character.

174 To sum up my opinion to this point, I am of opinion that at the date of the lodging of the Application the Court had jurisdiction and that it still has jurisdiction to hear and determine the dispute between France and Australia which at that time existed as to the claim to the unlawfulness, in the respects specified in the first three bases of claim in my earlier enumeration, of the deposition and intrusion of radio-active particles of matter on to and into Australian land, air and adjacent seas resulting from the detonation by France in its territory at Mururoa in the South Pacific of **nuclear** devices, and as to the unlawfulness of the proposed French activity in relation to the high seas and the super-incumbent air space. I am of opinion that there is a dispute between the Parties as to a matter of legal right in respect of the **testing** by France of **nuclear** weapons in the atmosphere of the South Pacific. If it should be found that the Applicant has a legal right to complain of that **testing** and thus a legal interest to maintain this Application in respect of such **testing**, the Court has jurisdiction, in my opinion, to hear and determine the dispute between the Parties as to the unlawfulness of the **testing** by France of **nuclear** weapons in the atmosphere of the South Pacific. It will in that event, in relation to this basis of claim also, be a dispute as to their respective rights within Article 17 of the General Act.

175 In so far as the admissibility of the Application may be a question separate from that of jurisdiction in this case, I am of opinion that the Application is admissible in respect of all the bases of claim other than that basis which asserts that the customary international law now includes a prohibition against the **testing** of **nuclear** weapons. In my opinion, it cannot be said, as a matter

of an exclusively preliminary character, that the Application in respect of this basis of claim is inadmissible, that is to say, it cannot now be said that the Applicant certainly has no legal interest to maintain its Application in that respect. In my opinion, the question of admissibility in respect of this basis of claim is not a question of an exclusively preliminary character and that it ought to be decided at a later stage of the proceedings.

Dissent from Judgment

176 I have already expressed myself as to the injustice of the procedure adopted by the Court. I regret to find myself unable to agree with the substance of the Judgment, and must comment thereon in expressing my reasons for dissenting from it.

Explanation for not Notifying and Hearing Parties

177 The first matter to which I direct attention in the Judgment is that part of it which expresses the Court's reason for not having notified the Parties and for not having heard argument (e.g., see Judgment, para. 33).

178 The Judgment in this connection begins with the circumstance that a communiqué from the Office of the President of France dated 8 June **1974**, which had been communicated to Australia, was brought to the attention of the Court by the Applicant in the course of the oral hearing on the preliminary questions. The Judgment then refers to a number of statements which it designates as acts of France and which it says are "consistent" with the communiqué of 8 June **1974**; the Court says it would be proper to take cognizance of these statements (paras. 31 and 32 of the Judgment). I may remark in passing that the question is not whether these statements were matters which might properly be considered by the Court if appropriate procedures were adopted. The question is whether this evidentiary matter ought to be acted upon without notice to the Parties and without hearing them. The Court in its Judgment says :

"It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties. This is manifestly not the case. The essential material which the Court must examine was introduced into the proceedings by the Applicant itself, by no means incidentally, during the course of the hearings, when it drew the Court's attention to a statement by the French authorities made prior to that date, submitted the documents containing it and presented an interpretation of its character, touching particularly upon the question whether it contained a firm assurance. Thus both the statement and the Australian interpretation of it are before the Court pursuant to action by the Applicant. Moreover, the Applicant subsequently publicly expressed its comments (see paragraph 28 above) on statements made by the French authorities since the closure of the oral proceedings. The Court is therefore in possession not only of the statements made by French authorities concerning the cessation of atmospheric **nuclear testing**, but also of the views of the Applicant on them. Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim *audi alteram partem*, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar. Thus the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The

Court, having taken note of the Applicant's comments and feeling no obligation to consult the Parties on the basis for its decision, finds that the reopening of the oral proceedings would serve no useful purpose." (Para. 33.)

179 It is true that the communiqué of 8 June 1974 which issued from the Office of the President of France was brought to the Court's attention by the Applicant in the course of the oral hearing. Indeed, I should have thought the Applicant would have been bound to do so. But it seems to me that it was not introduced in relation to some further question beyond the two questions mentioned in the Order of 22 June 1973. It is true that a comment was made on the communiqué by the Applicant's counsel of which the terms are recited in the Judgment. But in my opinion it cannot truly be said that the reference to the communication was made to introduce and argue the questions the Court has decided. Counsel for the Applicant when making his comment thereon, as appears from the verbatim record of the proceedings, was reviewing developments in relation to these proceedings since he last addressed the Court, that is to say, since he did so in connection with the indication of interim measures. He referred to the failure of France to observe the Court's indication of interim measures and to certain further resolutions of the General Assembly and of UNSCEAR. As indicative of what, from the Applicant's point of view, was continued French obduracy, he referred to the communiqué from the President's Office criticizing its factual inaccuracy and emphasizing that it did not contain any firm indication that atmospheric testing was to come to an end. He pointed out that a decision to test underground did not carry any necessary implication that no further atmospheric testing would take place. He asserted that the Applicant had had scientific advice that the possibility of further atmospheric testing taking place after the commencement of underground tests could not be excluded. He indicated that the communiqué had not satisfied the Applicant to the point that the Applicant desired to discontinue the legal proceedings. On the contrary, he indicated that the Applicant proposed to pursue its Application, as in fact it did, continuing the argument on the two questions mentioned in the Order of 22 June 1973. I might interpolate that that argument continued without any intervention by the Court.

180 But in my opinion this comment of counsel for the Applicant was in no sense a discussion of the question as to whether the claim had become "without object", either because the dispute as to the legal right had been settled, or because no opportunity remained for making a judicial Order upon the Application. It was not directed to that question at all. Nor was it directed to the question whether the communiqué was intended to undertake an international obligation. In no sense did it constitute in my opinion a submission with respect to those questions or either of them. In my opinion it cannot be made the basis for the decision without hearing the Parties. It cannot provide in my opinion any justification for the course the Court has taken. In my opinion it cannot justly be said, as it is said in the Judgment, that the Applicant "could reasonably expect that the Court would ... come to its own conclusion" from the document of 8 June 1974 (see para. 33), i.e., as to whether or not the Application had become "without object". Apart from all else, the Applicant was not to know that the Court would receive the further statements and use them in its decision.

181 I have said that in my opinion the question whether the Application has, by reason of the events occurring since the Application was lodged, become "without object" is not in any sense embraced by or involved in the questions mentioned in the Order of 22 June 1973. They related, and in my opinion related exclusively, to the situation which obtained at the date of the lodging of the Application. They could not conceivably have related to facts and events subsequent to 22 June 1973. But, of course, events which occurred subsequent to the lodging of the Application might provoke further questions which might require to be dealt with in a proper procedural manner and decided by the Court after hearing the Parties with respect to them.

182 If there is a question at this stage of the proceedings whether the Application has become "without object", either because the dispute which is before the Court had been resolved, or because the Court cannot in the present circumstances, within its judicial function, now make an

Order having effect between the Parties, the Court ought, in my opinion, first to have decided the questions then before it and to have fixed times for a further hearing of the case at which the question whether the Application had become “without object” could be examined in a public hearing at which the Parties could place before the Court any relevant evidence which they desired the Court to consider, for it cannot be assumed that the material of which the Court has taken cognizance is necessarily the whole of the relevant material, and at which counsel could have been heard.

183 The decision of the questions of jurisdiction and of admissibility would in no wise have compromised the consideration and decision on the question which the Court has decided. Indeed, as I think, to have decided what was the nature of the Parties' dispute would have greatly clarified the question whether an admissible dispute had been resolved. Further the failure to decide these questions really saves no time or effort. As I have mentioned, the Memorial and argument of the Applicant have been presented and the questions have been discussed by the Court.

184 It is of course for the Court to resolve all questions which come before it: the Court is not bound by the views of one of the parties. But is this a sufficient or any reason for not notifying the parties of an additional question which the Court proposes to consider and for not affording the parties an opportunity to put before the Court their views as to how the Court should decide the question, whether it be one of fact or one of law? The Court's procedure is built on the basis that the parties will be heard in connection with matters that are before it for decision and that the Court will follow what is commonly called the “adversary procedure” in its consideration of such matters. See, e.g., Articles 42, 43, 46, 48 and 54 of the Statute of the Court. The Rules of Court *passim* are redolent of that fact. Whilst it is true that it is for the Court to determine what the fact is and what the law is, there is to my mind, to say the least, a degree of judicial novelty in the proposition that, in deciding matters of fact, the Court can properly spurn the participation of the parties. Even as to matters of law, a claim to judicial omniscience which can derive no assistance from the submissions of learned counsel would be to my mind an unfamiliar, indeed, a quaint but unconvincing affectation.

185 I find nothing in the Judgment of the Court which, in my opinion, can justify the course the Court has taken. It could not properly be said, in my opinion, consistently with the observance of the Court's judicial function, that the Court could feel no obligation to hear the Parties' oral submissions or that “the reopening of the oral proceedings would serve no useful purpose” (see para. 33 of the Judgment).

Elements of Judgment

186 The Judgment is compounded of the following elements : first, an interpretation of the claim in the Application. It is concluded that the true nature of the claim before the Court is no more than a claim to bring about the cessation of the **testing** of **nuclear** weapons in the South Pacific ; second, a finding that the Applicant, in pursuit of its goal or objective to bring about that cessation would have been satisfied to accept what could have been regarded by it as a firm, explicit and binding undertaking by France no longer to **test nuclear** weapons in the atmosphere of that area. Such an assurance would have been accepted as fulfilling that purpose or objective; third, a finding that France by the communiqué of 8 June **1974**, when viewed in the light of the later statements which are quoted in the Judgment intentionally gave an assurance, internationally binding, and presumably therefore binding France to Australia, that after the conclusion of the **1974** series of **tests** France would not again **test nuclear** weapons in the atmosphere of the South Pacific ; and lastly, a conclusion that the giving of that assurance, though not found satisfactory and accepted by Australia, ended the dispute between Australia and France which had been brought before the Court, so that the Application lodged on 9 May 1973 no longer had any object, had become “without object”.

187 Each of these elements of the Judgment has difficulties for me. The Judgment says that the

“objective” of the Applicant was to obtain the termination of the atmospheric **tests**, “the original and ultimate objective of the Applicant was and has remained to obtain a termination of” the atmospheric **nuclear tests** (see paras. 26 and 30 of the Judgment). Paragraph 31 of the Judgment refers to “the object of the Applicant's claim” as being “to prevent further **tests**”. Thus the objective or object is at times said to be that of the Applicant, at other times it is said to be the objective of the Application or of the claim.

188 The Judgment, in seeking what it describes as the true nature of the claim submitted by the Applicant, ought to have regarded the Application, which by the Rules of Court must state the subject of the dispute, as the point of reference for the consideration by the Court of the nature and extent of the dispute before it (see Art. 35 of the Rules of Court). The Applicant at no stage departed from the Application and the relief it claimed.

189 By the Application the Applicant seeks two elements in the Court's Judgment, that is to say, a declaration of the illegality of further **tests** and an Order terminating such **tests**. The Applicant's requests are directed to the future. But the future to which the Application in seeking a declaration relates begins as from 9 May 1973, the date of the lodging of the Application, and not, as from the date of the Judgment or from some other time in **1974**. The Judgment proceeds as I think, in direct contradiction of the language of the Application and of its clear intent, to conclude that the request for a declaration in the Application is no more than a basis for obtaining an Order having the effect of terminating atmospheric **tests**. The Judgment further says that a finding that further **tests** would not be consistent with international law would only be a means to an end and not an end in itself (see para. 30 of the Judgment). The Judgment overlooks the terms of paragraph 19 of the Application which is in part in the following terms :

“The Australian Government will seek a declaration that the holding of further atmospheric **tests** by the French Government in the Pacific Ocean is not in accordance with international law and involves an infringement of the rights of Australia. The Australian Government will also request that, unless the French Government should give the Court an undertaking that the French Government will treat a declaration by the Court in the sense just stated as a sufficient ground for discontinuing further atmospheric **testing**, the Court should make an order calling upon the French Republic to refrain from any further atmospheric **tests**.”

190 I might interpolate here the observation that it just could not be said, in my opinion, that a declaration, made now, that the **tests** carried out in 1973 and **1974** (which as of 9 May 1973, were “future **tests**”) were unlawful, would do no more than provide a reason for an injunction to restrain the **tests** which might be carried out in 1975. In my opinion the obvious incorrectness of such a statement is illustrative of the fact that the request in the Application for a declaration was itself a request for substantive relief. Apart from a claim for compensatory relief in relation to them-a matter to which I later refer-a declaration of unlawfulness is all that could be done as to those **tests**. Obviously there could be no order for an injunction.

191 In concluding that the nature of the Application was no more than that of a claim for the cessation of the **nuclear tests**, two related steps are taken, the validity of neither of which I am able to accept. First of all, the purpose with which the litigation was commenced, the goal or objective sought thereby to be attained, is identified in the Judgment with the nature of the claim made in the Application and the relief sought in the proceedings. But it seems to me that they are not the same. They are quite different things. To confuse them must lead to an erroneous conclusion as in my opinion has happened.

192 Undoubtedly, the purpose of the Applicant in commencing the litigation was to prevent further atomic detonations in the course of **testing nuclear** weapons in the atmosphere of the South Pacific as from the date of the lodging of its Application. Apparently it desired to do so for two avowed reasons, first to prevent harmful fall-out entering the Australian environment and,

secondly, to prevent the proliferation of **nuclear** armament. I have already called attention to the different bases of the Applicant's claim which reflect those different reasons. Diplomatic approaches having failed, the means of achieving that purpose was the creation of a dispute as to the legal rights of the Parties and the commencement of a suit in this Court founded on that dispute in which relief of two specific kinds was claimed, the principal of which in reality, in my opinion, is the declaration as to the matter of right. The injunctive relief was in truth consequential. The attitude of the Applicant expressed in paragraph 19 of its Application is consistent with the practice of international tribunals which deal with States and of municipal tribunals when dealing with governments. It is generally considered sufficient to declare the law expecting that States and governments will respect the Court's declaration and act accordingly. That I understand has been the practice of this Court and of its predecessor. Thus the request for a declaration of unlawfulness in international law is, in my opinion, not merely the primary but the principal claim of the Application. It is appropriate to the resolution of a dispute as to legal rights.

193 The second step taken by the Judgment not unrelated to the first is to identify the word "object" or "objective" in the sense of a goal to be attained or a purpose to be pursued, with the word "object" in the expression of art "without object" as used in the jurisprudence of this Court. This in my opinion is to confuse two quite disparate concepts. The one relates to motivation and the other to the substantive legal content of an Application. Motivation, unless the claim or dispute involved some matter of good faith, would in my opinion be of no concern to the Court when resolving a dispute as to legal right.

194 It is implicit in the Judgment, in my opinion, that the Parties at the date of the lodgment of the Application were in dispute and presumably in dispute as to their legal rights. But the Judgment does not condescend to an express examination of the nature of the dispute between the Parties which it decides has been resolved and has ceased to exist. I have expressed my views of that dispute in an earlier part of this opinion. If the Court had come to the same conclusion as I have, it would in my opinion have been immediately apparent that the goal or objective of the Applicant in commencing the litigation could not be identified with its claim to the resolution of the dispute as to the respective legal rights of the Parties. It would further have been apparent, in my opinion, that for a court called upon to decide whether such a dispute persisted, the motives, purposes or objective of the Applicant in launching the litigation were irrelevant. It would also have been seen that a voluntary promise given without admission and whilst maintaining the right to do so, not to **test** atmospherically in the future could not resolve a dispute as to whether it had been or would be unlawful to do so. I add "had been" because of the 1973 series of **tests** which had taken place before the issue of the communiqué of 8 June **1974**.

195 If, on the other hand, the Court on such an examination of the nature of the dispute, had decided that the dispute between the Parties was not a dispute as to their respective legal rights, the Court would have decided either that it had no jurisdiction to hear and determine the Application or that the Application was inadmissible. In that event no question of the dispute having been resolved would have emerged.

196 Although the matter receives no express discussion, and although I think it is implicit in the Judgment that the Parties were relevantly in dispute when the Application was lodged, the Judgment, it seems to me, treats the Parties as having then been in dispute as to whether or not France should cease **tests** in the Pacific. But if the Parties had only been in dispute as to whether or not France should do so or should give an assurance that it would do so, the dispute would not have been justiciable; in which case, no question as to the Application having *become* without object would arise. Whether the Application when lodged was or was not justiciable was in my opinion part of the questions to which the Order of 22 June 1973 was directed and I have so treated the matter in what I have so far written. It seems to me that in that connection some have thought that the dispute between France and Australia was no more than a dispute as to whether France ought or ought not in comity to cease to **test** in the atmosphere of the South Pacific. If that were

the dispute the Court could have had no function in its resolution : it could properly have been regarded as an exclusively political dispute. The Application could properly have been said to be “without object” when lodged. I have found myself and I find myself still unable to accept that view. The dispute which is brought before the Court by the Application is claimed to be, and as I have said in my opinion it is, a dispute as to the legal rights of the Parties. The question between them which the Application brings for resolution by the Court in my opinion is not whether France of its own volition *will* not, but whether lawfully it *cannot*, continue to do as it has done theretofore at Mururoa with the stated consequences for Australia. The importance of the Court first deciding whether or not the dispute between the Parties was a dispute as to their respective rights is thus quite apparent. But in any case it seems to me that the Applicant's purpose in commencing the litigation is irrelevant to the question whether the claim which is made is one the Court can entertain and decide according to legal norms, and the relief which is sought is relief which the Court judicially can grant.

197 The confusion of motivation with the substance of the Application permeates the Judgment in the discussion of the nature of the claim the Application makes. The Judgment refers to statements of counsel in the course of the oral hearing and proceeds in paragraph 27 :

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

In this passage there is again implicit an identification of the Applicant's ultimate purpose in bringing the proceedings with the claim which it makes in the Application before the Court. If it were to be assumed that the Applicant would in fact have treated such an undertaking as the Court describes as sufficient for its purposes in commencing the litigation, the Applicant, in my opinion, could not have regarded that undertaking as having resolved the matter of right which in my opinion was the basis of its claim in the Application before the Court. It could not have regarded its dispute as to legal rights as having been resolved. The assurance which the Court finds to have been given was in no sense an admission of illegality of the French **testing** and of its consequences. France throughout continued to maintain that its **nuclear tests** “do not contravene any subsisting provision of international law” (French *White Book*). All the Applicant could have done would have been to accept the assurance as in the nature of a settlement of the litigation and thereupon to have withdrawn the Application in accordance with the Rules of Court. It would not do so in my opinion, because the dispute as to the respective rights of the Parties had been resolved, nor because its claim in the Application “had been met”, but because as a compromise the Applicant had been prepared to accept the assurance as sufficient for its purposes.

198 The question whether a litigant will accept less than that which it has claimed in the Court as a satisfaction of its purpose in commencing a litigation is essentially a matter for the litigant. It is not a matter, in my opinion, which can be controlled by the Court directly or indirectly. Indeed, it is not a matter into which the Court, if it confines itself to its judicial function, ought to enter at all. Even if it be right that the Applicant would have accepted what the Applicant regarded as a firm, explicit and binding undertaking to refrain from further atmospheric **tests**, the Court is not warranted in deciding what the Applicant ought to accept in lieu of its claim to the Court's Judgment. So to do is in effect to compromise the claim, not to resolve the dispute as to a matter of right. There is in any case, to my mind, obvious incongruity in regarding a voluntary assurance of future conduct which makes no admission of any legal right as the resolution of a dispute as to the existence of the legal right which, if upheld, would preclude that conduct.

199 The departure from the language of the Application and the identification of the claim which it makes with the object, objective or goal of the Applicant in making the Application thus provided, in my opinion, an erroneous base upon which to build the Judgment.

200 Further, the Judgment, it seems to me, overlooks the fact that in all the references to assurances in the correspondence and in the oral hearings the Applicant referred to an assurance with the nature and terms of which it was satisfied. These references cannot be read in my opinion as indicating such an assurance as might be regarded as sufficient for Australia's purposes by any other judgment than its own.

201 The Judgment proceeds to hold that France by the communiqué of 8 June **1974**, as confirmed by the subsequent Presidential and Ministerial statements to the press, did give to the international community and thus to Australia an undertaking, binding internationally, not on any occasion subsequent to the conclusion of the **1974** series of **tests** to **test nuclear** weapons in the atmosphere of the South Pacific.

202 My first observation is that this is a conclusion of fact. It is not in my opinion a conclusion of law. The inferences to be drawn from the issuing and the terms of the communiqué of 8 June **1974** are, in my opinion, inferences of fact, including the critical fact of the intention of France in the matter. So also, in my opinion, is the meaning to be given to the various statements which are set out in the Judgment. A decision as to those inferences and those meanings is not in my opinion an exercise in legal interpretation ; it is an exercise in fact-finding.

203 But whether the conclusion be one of fact or one of law, my comments as to the judicial impropriety of deciding the matter without notice to the Parties of the questions to be considered, and without affording them an opportunity to make their submissions, are equally applicable.

204 This is a very important conclusion purporting to impose on France an internationally binding obligation of a far-reaching kind. Nothing is found as to the duration of the obligation although nothing said in the Judgment would suggest that it is of a temporary nature. There are apparently no qualifications of it related to changes in circumstances or to the varying needs of French security. Apparently it is restricted to the South Pacific area, a limitation implied from the fact that the source of the obligation is the communique of 8 June **1974** issued in the context of the imminence of the **1974** series of **tests**.

205 The purpose and intention of issuing the communique and subsequently making the various statements is to my mind far from clear. The Judgment finds an intention to enter into a binding legal obligation after giving the warning that statements limiting a State's freedom of action should receive a restrictive interpretation. The Judgment apparently finds the clear intention in the language used. I regret to say that I am unable to do so. There seems to be nothing, either in the language used or in the circumstances of its employment, which in my opinion would warrant, and certainly nothing to compel, the conclusion that those making the statements were intending to enter into a solemn and far-reaching international obligation rather than to announce the current intention of the French Government. I would have thought myself that the more natural conclusion to draw from the various statements was that they were statements of policy and not intended as undertaking to the international community such a far-reaching obligation. The Judgment does not seem to my mind to offer any reason why these statements should be regarded as expressing an intention to accept an internationally binding undertaking rather than an intention to make statements of current government policy and intention.

206 Further, it seems to me strange to say the least that the French Government at a time when it had not completed its **1974** series of **tests** and did not know that the weather conditions of the winter in the southern hemisphere would permit them to be carried out, should pre-empt itself from **testing** again in the atmosphere, even if the **1974** series should, apart from the effects of weather, prove inadequate for the purposes which prompted France to undertake them. A conclusion that France has made such an undertaking without any reservation of any kind, such, for example, as is found in the Moscow Treaty Banning **Nuclear** Weapon **Tests** in the Atmosphere, in Outer Space and Under Water, to which France is not a party, is quite remarkable and difficult to accept.

207 It is noticeable that the communique itself as sent to Australia makes no express reference to atmospheric **testing**. The message sent by the French Embassy in Wellington to the Government of New Zealand with respect to the communique, drew a conclusion not expressed in the communique itself. Somewhat guardedly the Embassy added the words "in the normal course of events" which tended to weaken the inference which apparently the Embassy had drawn from the terms of the communiqué.

208 In this connection it may be observed that both the Government of Australia and the Government of New Zealand in responding to the communique of 8 June **1974**, virtually challenged France to give to them an express undertaking that no further **tests** would be carried out in the South Pacific. There has been ample opportunity for France to have unequivocally made such a statement: but no such express statement has been communicated to either Applicant. Without entering further into detailed criticism of the finding of fact of which personally I am not convinced, it is enough to say that there is, in my opinion, much room for grave doubt as to the correctness of the conclusion which the Court has drawn. That circumstance underlines the essential need to have heard argument before decision.

209 There is a further substantial matter to be mentioned in this connection. The Court has purported to decide that France has assumed an international obligation of which Australia has the benefit. It is this circumstance which the Judgment holds has resolved the dispute between France and Australia and caused it to cease to exist. But the Court has not decided its jurisdiction as between these Parties. France has steadfastly maintained that the Court has no jurisdiction. The Court's finding that France has entered into an international obligation is intended to be a finding binding both Parties to the litigation, France as well as Australia. But I am at a loss to understand how France can be bound by the finding if the Court has not declared its jurisdiction in the matter.

210 The Judgment seems to call in aid what it calls an inherent jurisdiction to provide for the orderly settlement of all matters in dispute, to ensure the observance of the inherent limitations on the exercise of the judicial function of the Court and to maintain its judicial character. I do not wish to enter into a discussion of this very broadly stated and, as I think, far-reaching claim to jurisdiction. Let it be supposed that the so-called inherent or incidental jurisdiction as some writers call it would enable the Court to decide that it had no jurisdiction or that an application was not admissible where this could be done without deciding matters of fact; where the matter could be decided upon the face of an admitted or uncontested document. In such a case the Court may be able to find a lack of jurisdiction or of admissibility. But that is not the position here. The Judgment does not merely deny the Applicant a hearing of the Application because of the disappearance of the Applicant's case. The Court purports to decide a matter of fact whereby to bind France to an international obligation. Assuming without deciding that the claim to jurisdiction made in paragraph 23 of the Judgment is properly made, that jurisdiction could not extend in my opinion to give the Court authority to bind France, which has stoutly and consistently denied that it has consented to the jurisdiction.

211 It may well be that even if the Court decided that it has jurisdiction under Article 36 (1) and the General Act to settle a dispute between Australia and France as to their respective rights in relation to **nuclear testing**, the consent of France given through Article 17 may not extend to include or involve a consent by France to the determination by the Court that France had accepted a binding obligation to the international community not to **test** in the atmosphere again, a fact not involved in settling the dispute as to their respective rights. But I have no need to examine that question for the Court has not even decided that it has jurisdiction to settle the dispute between the Parties. I am unable to accept that France is bound by the Court's finding of fact that it has accepted an internationally binding obligation not again to **test** in the atmosphere of the South Pacific. This is an additional reason why the dispute between Australia and France should not be regarded as resolved.

212 For all these reasons, I am unable to accept the conclusion that, by reason of the communique of 8 June **1974** and the statements recited in the Judgment, the dispute between Australia and France has been resolved and has ceased to exist.

Could the Court Properly Make an Order?

213 I would now consider the other reason for which a case may become “without object”, namely that in the existing circumstances no judicial Order capable of effect between the Parties could be made.

214 Since the Application was lodged, France has conducted two series of atmospheric **nuclear tests** in the South Pacific Ocean, one in 1973 and another in **1974**. It has done so in direct breach of this Court's indication of interim measures. It would seem to be incontestable that as a result thereof radio-active matter, “fall-out”, has entered the Australian territory and environment. From the information conveyed by the Applicant to the Court during the hearings, it seems that the Applicant has monitored its land and atmosphere following upon such **nuclear tests** in order to determine whether they were followed by fall-out and in order to determine the precise extent of such fall-out. I have already indicated that these were future **tests** within the meaning of the Application.

215 Australia has not yet been required to make its final submissions in this case. These two series of **tests** and their consequences were clearly not events for which the Applicant had to make provision in its Application. It seems to me, therefore, that in the situation that now obtains nothing said in or omitted from the Application or in its presentation to the Court could preclude the Applicant from asking in its final submissions for some relief appropriate to the fact that these **nuclear tests**, carried out in breach of the Court's indication of interim measures, caused harm to Australia and its population and indeed involved the expenditure of money ; for though perhaps a minor matter, it can scarcely be doubted that the monitoring to determine fall-out, if any, and its extent has involved considerable expenditure, expenditure that would appear to me to be causally related to the explosions carried out by France during the 1973 and **1974** series of **tests** .

216 It is observable that the request in the Application is not for a declaration that **tests** which have already been carried out prior to 9 May 1973 were unlawful, though of course in the nature of things a declaration that further **tests** after 9 May 1973 would be unlawful would carry in this case the conclusion that those which had already taken place were also unlawful. In the presentation of its case the Applicant said that “at the present time” it did not seek any compensatory Order in the nature of damages. In truth such a claim for damages made in the Application would not easily have been seen to be consistent with the nature of the claims actually made in the Application. They, as I have pointed out, are for a declaration of right and an Order to prevent any **tests** occurring after 9 May 1973 ; hence the request for the indication of interim measures made immediately upon the lodging of the Application. Any claim to be paid damages if made in the Application itself would in the circumstances necessarily have been a claim in respect of past **tests** carried out by France, which were not directly embraced in the claim made in the Application. Further, a claim for damages could scarcely relate to **tests** which might yet, as of 9 May 1973, be carried out by France. If the Applicant were to succeed there would be none, for the Applicant seeks to restrain them as from the date of the lodgment of the Application. Further, the case was not one in which the Applicant could ask for compensation as a substitute for an injunction, that is to say on the assumption that the Applicant succeeded in obtaining a declaration and failed to get an Order for injunction.

217 A claim, therefore, by the Applicant in its final submissions for relief appropriate to the events of 1973 and **1974** would not be inconsistent with what has been said so far. Indeed, such a claim would be related to the dispute on which the Application was founded. Assuming the Applicant to be right in its contentions, the **tests** of 1973 and **1974** and their consequences in Australia constitute a breach of Australia's rights. Thus, as I said earlier, it could not properly be said that a

declaration made now in conformity with the Application, would be doing no more than affording a reason for an Order of injunction. A claim for relief related to what has occurred since the Application was lodged and to the consequences of the **tests** of 1973 and **1974** would not transform the dispute which existed at the date of the lodgment of the Application into another dispute different in character: nor would it be a profound transformation of the character of the case by amendment, to use the expression of the Court in the *Société Commerciale de Belgique* case (*P.C.I.J., Series A/B, No. 78*, at p. 173). Rather it would attract the observations of the Court in that case to the effect that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably but without infringing the terms of the Statute or the Rules of Court (*op. cit.*).

218 This ability of the Applicant to include in its final submissions to the Court a claim for relief of the kind I have suggested indicates that a declaration by the Court in terms of the Application, but made more specific by a reference to those **nuclear tests** which took place in 1973 and **1974** and their consequences, is capable of affecting the legal interests or relationship of the Parties. It could not properly, in my opinion, be said that to make such a declaration would be an exercise outside the judicial function or that it would be purposeless. It would be dealing with a matter of substance. The Court, in my opinion, could also make an Order for some form of compensatory relief if such an Order were sought. Indeed, if the Applicant succeeded on the merits of its claim, some Order with respect to the conduct and consequences of the **tests** of 1973 and **1974** might well be expected.

219 In any case, and quite apart from any question of any additional claim for relief contained in the Applicant's final submission, should the Applicant succeed on the merits of its Application in respect of any of the first three bases of its claim, a declaration by the Court in relation to that basis or those bases of claim, with possibly a specific reference to the results in Australia of the carrying out by France of the 1973 and **1974** series of **tests**, would, in my opinion, be properly made within the scope of the Court's judicial function. Quite apart from any damage caused by the 1973–**1974** series of **tests**, such a declaration could found subsequent claims by Australia upon France in respect of past **testing** by France of **nuclear** weapons in the South Pacific.

220 It was said by the Court in the case of the *Northern Cameroons* (*supra*) :

“The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.” (*I.C.J. Reports 1963*, pp. 33–34.)

The Court also said :

“Moreover the Court observes that if in a declaratory judgment it expounds a rule of customary law or interprets a treaty which remains in force, its judgment has a continuing applicability.”

221 Success of the Applicant in respect of one or more of the first three bases of its claim would establish that it had been in dispute with France as to their respective legal rights, that its claims of right to which the Court's declaration related was or were valid, and that France had been in breach of that right or those rights. To declare this situation, the Judgment, in my opinion, would satisfy what the Court said in the quotations I have made. The judgment would be stating the law in connection with a concrete case, where the Parties remained in dispute as to their respective legal rights. The Court's declaration would affect their existing legal rights and obligations. In addition, the Court would be expounding a rule of customary law in relation to the territorial sovereignty of the Applicant as a State in the international community.

222 A judgment affirming the Court's jurisdiction would involve a decision that the General Act remained in force and a decision that the Parties were in dispute as to their respective rights within the meaning of Article 17 of the General Act. Thus an interpretation would be placed on Article 17. Therefore a declaration could properly be made and would have legal effect.

223 If the Applicant were also to succeed upon the fourth basis of its claim, again the Court would be stating the law in a concrete case where the Parties remained in dispute, and it would be expounding a rule of customary law, and the other comments I have made would be applicable.

224 These results would follow, in my opinion, even if the Court, in its discretion, refrained from making any immediate Order of injunction. It might do so because it was satisfied that France would not again explode **nuclear** devices or **test** weapons in the atmosphere of the South Pacific, either because the Court was satisfied that France had already resolved not to do so, or because the Court was satisfied that France would respect the declaration of right which the Court had made in the matter. But the Court, if it saw fit, could in my opinion, with legal propriety, make an Order for injunction nonetheless. It is a matter of discretion for a court whether or not to make an order of injunction where it is satisfied that without the making of the order the conduct sought to be restrained will not occur.

225 Lastly, for the course the Judgment takes there is no precedent. The case of the *Northern Cameroons (supra)*, in my opinion, cannot be called in aid to justify the Judgment. In that case, what the Applicant claimed in its Application, the Court at the time of giving Judgment held that it could not do. The Court was asked to declare the breach of a trusteeship agreement which had ceased to be operative within a day or so of the lodging of the Application. The Court held that a declaration of its breach during the period of its operation could have no effect whatever between the Parties, there being no claim for compensation for the breach.

226 Judge Sir Gerald Fitzmaurice, in his separate opinion, expressed the view that from the outset of the case there was no justiciable dispute. Sir Gerald held that from the terms of the Application it was clear that the Court was not able to make an Order in the case affecting the legal relations of the Parties; therefore, in conformity with the definition he adopted in the case, there was no relevant dispute. He expressed himself at page 111 of his opinion (*I.C.J. Reports 1963*) in terms which I have already quoted.

227 The contrast between the situation of the present case and that of the case of the *Northern Cameroons* is apparent. Even for those who accept the validity of the Court's decision in the case of the *Northern Cameroons*, that case affords, in my opinion, no support for the present Judgment.

228 In my opinion, there is no discretion in this Court to refuse to decide a dispute submitted to it which it has jurisdiction to decide. Article 38 of its Statute seems to lay upon this Court a duty to decide. The case of *Northern Cameroons* at best covers a very narrow field in which no Order at all can properly be made by the Court.

229 Of course, if the dispute upon which it is sought to found jurisdiction has been resolved, no Order settling it can be made. Thus, the Judgment in this case can only be justified if the dispute between the Parties as to their legal rights has been resolved and ceased to exist.

230 However, for all the reasons I have expressed, I can find no ground upon which it can properly be held that the dispute between the Parties as to their respective rights has been resolved or has ceased to exist, or that the Court could not, in the circumstances of the case, properly make a judicial Order having effect between the Parties. The Application, in my opinion, has not become "without object".

(Signed) G. E. Barwick.

Footnotes:

1 District Court for the District of Columbia, 31 July 1958, 164 Federal Supplement, p. 390; Court of Appeals, 12 April 1960, 278 Federal Reporter, Second Series, pp. 252–255.

1 A Melbourne newspaper printed on 22 June the following article :

“The Prime Minister : We've won N-test case. The Prime Minister (Mr. Whitlam) said last night that Australia would win its appeal to the International Court of Justice by a majority of eight votes to six. Mr. Whitlam said he had been told the Court would make a decision within 22 hours. The Prime Minister made the prediction while addressing the annual dinner of the Victorian Law Institute. He said: ‘On the matter of the High Court, I am told a decision will be given in about 22 hours from now. The majority in our favour is going to be eight to six.’ When asked to elaborate on his comments after the dinner, Mr. Whitlam refused to comment, and said his remarks were off the record. The dinner was attended by several hundred members of the Law Institute, including several prominent judges. While making the prediction that the Court would vote eight to six, Mr. Whitlam placed his hand over a microphone. The microphone was being monitored by an ABC reporter.”

2 Four documents are to be published in this way. Two (see para. 31 below) have already been communicated to the French Government ; the others are reports to the Court.

1 Communicated to the French Government, by decision of the Court, on 29 March 1974.

2 Documents communicated to the French Government with a letter of 29 March 1974.

3 A letter of 28 February 1974 from the Agent of Australia to the Registrar is to be reproduced in the *Pleadings, Oral Arguments, Documents* volume ; it is connected with the interrogation.

1 This is one of the documents which the Court, on 13 December 1974, decided to publish in the *Pleadings, Oral Arguments, Documents* volume.

1 Having voted against the resolution whereby the Court, on 24 March 1974, decided to close the enquiry into the premature disclosure of its decision, as also of the voting-figures, before the Order of 22 June 1973 was read at a public sitting, I wish to state my opinion that the enquiry referred to was one of a judicial character and that its continuance on the bases already acquired should have enabled the Court to get closer to the truth. I did not agree with the decision whereby the Court excluded from publication, in the volume of *Pleadings, Oral Arguments, Documents* to be devoted to the case, certain documents which to my mind are important for the comprehension of the incident and the search for its origins.

1 *Right of Passage over Indian Territory, I.C.J. Reports 1960*, p. 32.

2 Ch. De Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice*, Paris, 1966, p. 54.

1 *I.C.J. Reports 1973*, p. 348.

1 Cf. the different opinions of Judges Badawi and Lauterpacht in the *Certain Norwegian Loans* case on the question whether a dispute essentially concerning the application of municipal law falls within the classes of legal disputes listed in Article 36 (2) of the Statute ; *I.C.J. Reports 1957*, at pp. 29–33 and 36–38.

1 *Second Phase, I.C.J. Reports 1970*, at p. 32.

1 I believe that I am entitled to express my opinion on the jurisdiction of the Court and the admissibility of the Application. It is true that, in a declaration appended to the Judgment in the *South West Africa* cases (*I.C.J. Reports 1966*, pp. 51–57), President Sir Percy Spender endeavoured to narrow the scope of the questions with which judges might deal in their opinions. But he was actually going against the practice followed in the cases upon which the Court was giving judgment at the time. It was in the following terms that he stated his view : “... such opinions should not purport to deal with matters that fall entirely outside the range of the Court's decision, or of the decision's motivation” (*ibid.*, p. 55). In the present case, it does not seem to me that the questions of jurisdiction and admissibility fall outside the range of the Court's decision. They are the questions specified in the Court's Order of 22 June 1973, and they are those which have to be resolved unless the dispute is manifestly without object.

1 By adding the words “and disputes concerning activities connected with national defence”.

2 In my opinion, the Court does not have to deal with the sophisticated arguments of the Applicant on this point, ingenious though they be. The objective nature of the reservation does not require that the meaning of the expression “national defence”, or what the French Government meant when it used it, be proved by evidence. The reservation should simply be interpreted as a declaration of unilateral will, should be interpreted, that is to say, taking into account the natural meaning of the words and the presumed intention of the declarer. What would require proof would be that it had a meaning contrary to the natural meaning of the terms used.

1 The separability of the reservation would have to be proved. Despite its efforts, the Applicant has not succeeded in bolstering this contention with convincing arguments.

1 Chapter II of the General Act, which is entitled “Judicial Settlement”, begins with Article 17. The individual and independent value of the Act, even after the winding-up of the League of Nations, is clear from the *travaux préparatoires* of resolution 268A (III) of the United Nations General Assembly, and from the actual text of that resolution.

1 Mr. Entezam was perhaps using the word “validity” in the sense of “full efficacy”.

1 It held that the Hispano-Belgian treaty was still in force, because of the applicability to it of Article 37 of the Statute.

1 The non-invocation of a treaty may in fact be due to its efficacy in obviating disputes between the parties-and thereby constitute the best evidence of its continuance in force.

2 It has been cited as being still in force by the most qualified writers in France and in other countries. Nonetheless, the doubts of Siorat should be noted, as to the validity of the Act after the winding-up of the League of Nations. He raises the problem whether the General Act might not have lapsed for a reason other than the winding-up of the Permanent Court: impossibility of execution, as a result of the disappearance of the machinery of the League of Nations, might be asserted. But for termination to have occurred, it would be necessary to prove that the functions laid on the League of Nations have not been transferred to the United Nations, and that the situation would both make execution literally impossible and create a total, complete and permanent impossibility. Generally accepted desuetude might also be asserted. This writer mentions that the attitude of the parties towards the Act is difficult to interpret, and points out that for there to be desuetude it would be necessary to prove indisputably that the parties had adopted a uniform attitude by acting with regard to the Act as though it did not exist, and that they had thus, in effect, concluded a tacit agreement to regard the Act as having terminated (“L'article 37 du Statut de la Cour internationale de Justice”, *Annuaire français de droit international*, 1962, pp. 321–323). It should be observed that the data given by this writer are somewhat incomplete.

1 The Court said that the French Government had mentioned the General Act of Geneva, but went

on to say that such a reference could not be regarded as sufficient to justify the view that the Application of the French Government was based upon the General Act. "If the French Government had intended to proceed upon that basis it would expressly have so stated." The Court considered that the Application of the French Government was based clearly and precisely on Article 36, paragraph 2, of the Statute. For that reason, the Court felt that it would not be justified in seeking a basis for its jurisdiction "different from that which the French Government itself set out in its Application and by reference to which the case had been presented by both Parties to the Court" (*I.C.J. Reports 1957*, p. 24 f.). It seems that it would not have been in the interest of the French Government to place emphasis on the General Act, because the latter, in Article 31, required the exhaustion of local remedies.

2 The Act is also cited in *I.C.J. Reports 1961*, p. 19. Pakistan invoked it as basis of the Court's jurisdiction in its Application of 11 May 1973 against India (a case which was removed from the list by an Order of 15 December 1973 following a discontinuance by Pakistan).

3 France and the United Kingdom have denounced the Act since the institution of the present proceedings.

4 Kunzmann, "Die Generalakte von New York und Genf als Streitschlichtungsvertrag der Vereinten Nationen", 56 *Die Friedens-Warte* (1961–1966), Basle, p. 22.

1 Though various hypotheses have been put forward to explain this apparently contradictory conduct.

1 Judge Morelli once pointed out that the distinction between a right of action and a substantive interest is proper to municipal law, whereas it is necessary in international law to ascertain whether there is a dispute (separate opinion, *I.C.J. Reports 1963*, pp. 132 f.). I do not find this observation particularly useful. To hold an application inadmissible because of the applicant's want of legal interest, or to reach the same conclusion because for want of such interest there is no dispute, comes to one and the same thing. Judge Morelli felt bound to criticize the 1962 *South West Africa* Judgment because in his view it confused "the right to institute proceedings" (which has to be examined as a preliminary question) and the existence of "a legal right or interest" or "a substantive right vested in the Applicants" (which has to be regarded as a question touching the merits) (separate opinion, *I.C.J. Reports 1966*, p. 61).

2 Sir Gerald Fitzmaurice has shed light on the meaning to be given to the term "dispute". He says that a legal dispute exists

"only if its outcome or *result, in the form of a decision of the Court*, is capable of affecting the *legal* interests or relations of the parties, in the sense of conferring or imposing upon (or confirming for) one or other of them, a legal right or obligation, or of operating as an injunction or a prohibition for the future, or as a ruling material to a still subsisting legal situation" (separate opinion, *I.C.J. Reports 1963*, p. 110).

The point thus made is not upset by the fact that proceedings can be instituted to secure a declaratory ruling, but in that connection it must be noted that what may properly fall to be determined in contentious proceedings is the existence or nonexistence of a right vested in a party thereto, or of a concrete or specific obligation. The Court cannot be called upon to make a declaratory finding of an abstract or general character as to the existence or non-existence of an objective rule of law, or of a general or non-specific obligation. That kind of declaration may be sought by means of a request for an advisory opinion.

1 The expression "obligations *erga omnes*" calls to mind the principle of municipal law to the effect that ownership imposes an obligation *erga omnes* ; but this obligation gives rise to a legal right or interest to assert ownership before a tribunal for the benefit of the owner who has been

injured in respect of his right or interest, or whose right or interest has been disregarded. Even in the case of theft, one cannot speak of an *actio popularis*-which is something different from capacity to report the theft to the authorities. It should also be borne in mind that a decision of the Court is not binding *erga omnes*: it has no binding force except between the parties to the proceedings and in respect of the particular case decided (Statute, Art. 59).

1 The idea that the Moscow Treaty, by its nature, partakes of customary law or *ius cogens* is laid open to some doubt by its want of universality and the reservation in its Article IV to the effect that "Each Party shall ... have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject-matter of this Treaty, have jeopardized the supreme interests of its country".

On the preconditions for the birth of a rule of customary law, cf. my separate opinion, *I.C.J. Reports* 1974, pp. 89 ff.

2 Mazeaud, *Traité théorique et pratique de la responsabilité civile*, 3rd ed., 1938, Vol. I, pp. 647 f., para. 597.

1 The relative importance of the interests of the Parties must be assessed, and the possibility of reconciling them (question of proximity and innocent usage).

2 In its Order of 22 June 1973, the Court alluded to the possibility that the tests might cause "irreparable damage" to the Applicant ; this is a possibility which should be kept in mind in relation to the indication of interim measures (in view notably of their urgent character) but not where admissibility is concerned.

3 Regarding the conditions on which a claim for damages can be entertained, c *I.C.J. Reports* 1974, pp. 203–205, especially para. 76, and see also *ibid.*, p. 225.

1 The Swiss Federal Tribunal laid down that, according to the rules of international law, a State may freely exercise its sovereignty provided it does not infringe rights derived from the sovereignty of another State ; the presence of certain shooting-butts in Aargau endangered areas of Solothurn, and the Tribunal forbade use of the butts until adequate protective measures had been introduced (*Judgments of the Swiss Federal Tribunal*, Vol. XXVI, Part I, pp. 449–451, Recital 3, quoted in Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public*, Neuchâtel 1958, p. 121).

2 The Award reaches that conclusion "under the principles of international law, as well as of the law of the United States". The award has been regarded as "basic for the whole problem of interference. Its bases are now part of customary international law", A. Randelzhofer, B. Simma, "Das Kernkraftwerk an der Grenze-Ein 'ultra-hazardous activity' im Schnittpunkt von internationalem Nachbarrecht und Umweltschutz", *Festschrift für Friedrich Berber*, Munich, 1973, p. 405. This award marks the abandonment of the theory of Harmon (absolute sovereignty of each State in its territory with regard to all others) ; Krakan, *Die Harmon Doktrin: Eine These der Vereinigten Staaten zum internationalen Flussrecht*, Hamburg, 1966, p. 9.

3 I.e., the continuance of the emission of harmful fumes, or the renewed emission of fumes if it is to be feared (*ad metuendum*) that harm will result. *Damnum infectum est damnum nondum factum, quod futurum veremur*, D. 39, 2, 2.

4 It would have to say, for example, whether or not account should be taken of the fact that continuation of the nuclear tests causes injury, in particular by way of apprehension, anxiety and concern, to the inhabitants and Government of Australia.

5 This raises the question of evidence (Arts. 48 and 50 of the Statute ; Art. 62 of the Rules).

