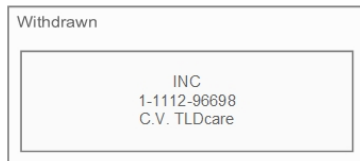
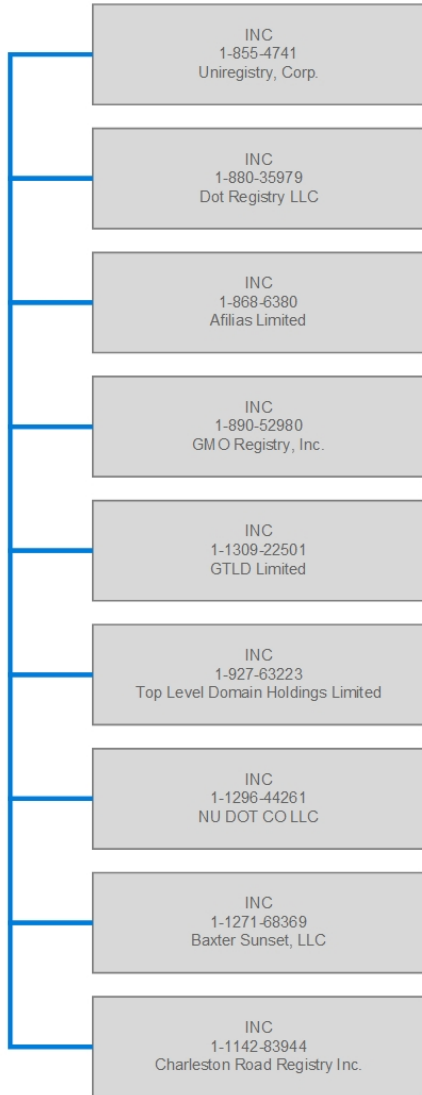


Contention Set: **INC**



Direct ———

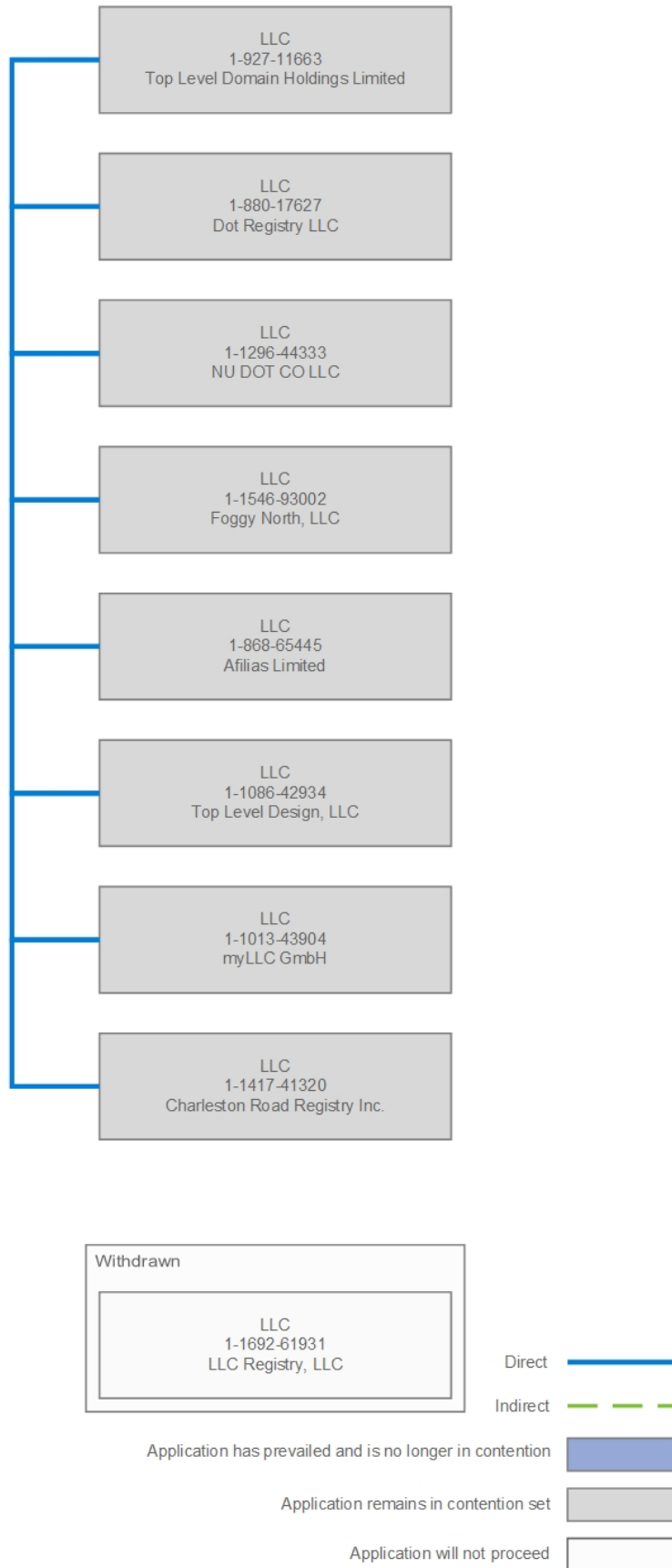
Indirect - - -

Application has prevailed and is no longer in contention

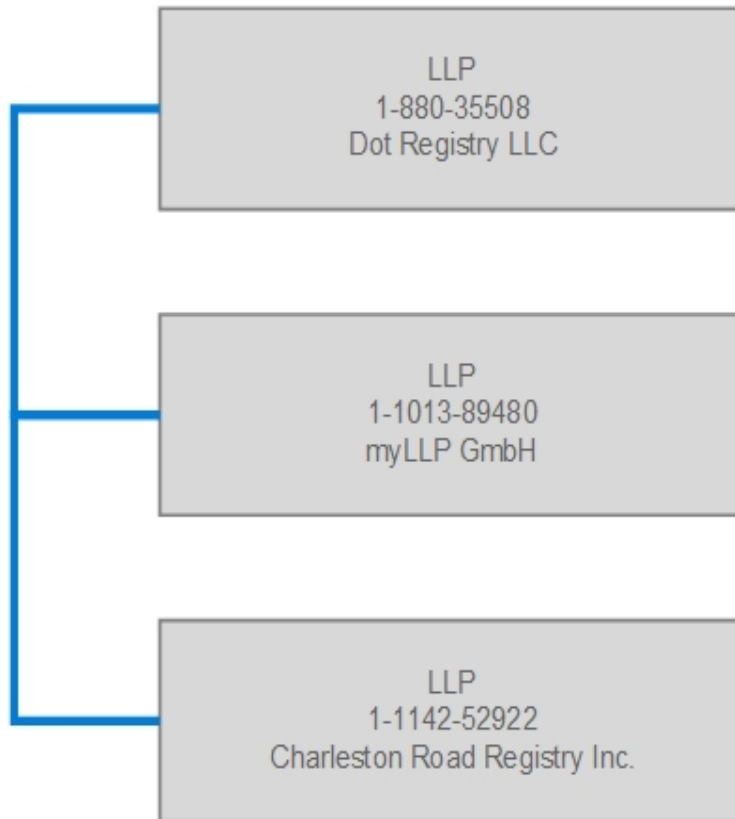
Application remains in contention set

Application will not proceed

Contention Set: LLC



Contention Set: **LLP**



Direct

Indirect

Application has prevailed and is no longer in contention

Application remains in contention set

Application will not proceed

November 7, 2014

Contention Set Stat ▾

Apply Filters

Reset All

and "Delegated", application statuses are not final.

A change in application status or update to a contention set is intended to inform the applicants and the community of an application's current status. A change or update is not a definite indication that an application may proceed to another phase of the program. For more information including definitions of application statuses see the [applicant advisory](#).

	Set Name	Set Number	Set Status	Number of Applications	Auction Date
▾	LLP View Image	45	Active	4	21 January 2015 <i>(Preliminary)</i>
	221 LLP 1-1693-56810 (Withdrawn)		PLL Registry, LLC		
	864 LLP 1-880-35508 (In Auction)		Dot Registry LLC CPE Report		
	1408 LLP 1-1013-89480 (In Auction)		myLLP GmbH		
	1893 LLP 1-1142-52922 (In Auction)		Charleston Road Registry Inc.		
▶	LTD View Image	73	Resolved	7	
▾	LLC View Image	81	Active	9	21 January 2015 <i>(Preliminary)</i>
	335 LLC 1-927-11663 (In Auction)		Top Level Domain Holdings Limited		
	342 LLC 1-880-17627 (In Auction)		Dot Registry LLC CPE Report		
	462 LLC 1-1296-44333 (In Auction)		NU DOT CO LLC		
	798 LLC 1-1546-93002 (In Auction)		Foggy North, LLC		
	941 LLC 1-1692-61931 (Withdrawn)		LLC Registry, LLC		
	1307 LLC 1-868-65445 (In Auction)		Afilias Limited		
	1425 LLC 1-1086-42934 (In Auction)		Top Level Design, LLC		
	1472 LLC 1-1013-43904 (In Auction)		myLLC GmbH		
	1843 LLC 1-1417-41320 (In Auction)		Charleston Road Registry Inc.		
▶	CORP View Image	86	On Hold ^[1]	6	
▾	INC View Image	102	Active	11	21 January 2015 <i>(Preliminary)</i>
	421 INC 1-855-4741 (In Auction)		Uniregistry, Corp.		
	531 INC 1-880-35979 (In Auction)		Dot Registry LLC CPE Report		
	714 INC 1-1692-77224 (Withdrawn)		CNI Registry, LLC		
	882 INC 1-868-6380 (In Auction)		Afilias Limited		
	964 INC 1-890-52980 (In Auction)		GMO Registry, Inc.		
	1122 INC 1-1309-22501 (In Auction)		GTLD Limited		
	1136 INC 1-927-63223 (In Auction)		Top Level Domain Holdings Limited		
	1481 INC 1-1296-44261 (In Auction)		NU DOT CO LLC		
	1503 INC 1-1112-96698 (Withdrawn)		C.V. TLDcare		
	1721 INC 1-1271-68369 (In Auction)		Baxter Sunset, LLC		
	1818 INC 1-1142-83944 (In Auction)		Charleston Road Registry Inc.		

Displaying 1 - 5 of 5

Notes:

1. **On Hold:** One or more applications in the contention set may have a status of On Hold. Applications in the set cannot proceed to New gTLD Program

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement Of Investment Disputes, Washington 1965

International Centre for Settlement of Investment Disputes (ICSID)

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International Centre For Settlement Of Investment Disputes
Submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development, Submitted: March 18, 1965, Washington
Entered into Force: October 14, 1966**

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SiSU Metadata, document information	17

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2 **PREAMBLE**

3 The Contracting States

4 Considering the need for international cooperation for economic
development, and the role of private international investment
therein;

5 Bearing in mind the possibility that from time to time disputes may
arise in connection with such investment between Contracting
States and nationals of other Contracting States;

6 Recognizing that while such disputes would usually be subject to
national legal processes, international methods of settlement may
be appropriate in certain cases;

7 Attaching particular importance to the availability of facilities for in-
ternational conciliation or arbitration to which Contracting States
and nationals of other Contracting States may submit such disputes
if they so desire;

8 Desiring to establish such facilities under the auspices of the Inter-
national Bank for Reconstruction and Development;

9 Recognizing that mutual consent by the parties to submit such dis-
putes to conciliation or to arbitration through such facilities con-
stitutes a binding agreement which requires in particular that due

consideration be given to any recommendation of conciliators, and
that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its
ratification, acceptance or approval of this Convention and without
its consent be deemed to be under any obligation to submit any
particular dispute to conciliation or arbitration,

Have agreed as follows:

CHAPTER I

International Centre for Settlement of Investment Disputes

SECTION 1: Establishment and Organization

Article 1

1. There is hereby established the International Centre for Settle-
ment of Investment Disputes (hereinafter called the Centre).

2. The purpose of the Centre shall be to provide facilities for concil-
iation and arbitration of investment disputes between Contracting
States and nationals of other Contracting States in accordance with
the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office for the Interna-
tional Bank for Reconstruction and Development (hereinafter called
the Bank). The seat may be moved to another place by decision
of the Administrative Council adopted by a majority of two-thirds of
its members.

20	Article 3		30
21	The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators	(a) adopt the administrative and Financial regulations of the Centre;	30
22	SECTION 2: The Administrative Council	(b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;	31
23	Article 4	(c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);	32
24	The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.	(d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;	33
25	In the absence of a contrary designation, each governor and alternate of the Bank appointed by a Contracting State shall be ex officio its representative and its alternate respectively.	(e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General.;	34
26	Article 5	(f) adopt the annual budget of revenues and expenditures of the Centre;	35
27	The President of the Bank shall be ex officio Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.	(g) approve the annual report on the operation of the Centre.	36
28	Article 6	The decisions referred to in sub-paragraphs (a), (b), (c) and (g) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.	37
29	1. Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall	2. The Administrative Council may appoint such committees as it considers necessary.	38
		3. The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of the Convention.	39
		Article 7	40
		1. The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.	41

42 2. Each member of the Administrative Council shall have one vote
and, except as otherwise herein provided, all matters before the
Council shall be decided by a majority of the votes cast.

43 3. A quorum for any meeting of the Administrative Council shall be
a majority of its members.

44 4. The Administrative Council may establish, by a majority of two-
thirds of its members, a procedure whereby the Chairman may
seek a vote of the Council without convening a meeting of the
Council. The vote shall be considered valid only if the majority
of the members of the Council cast their votes within the time limit
fixed by the said procedure.

45 **Article 8**

46 Members of the Administrative Council and the Chairman shall
serve without remuneration from the Centre.

47 **SECTION 3: The Secretariat**

48 **Article 9**

49 The Secretariat shall consist of a Secretary-General, one or
more

50 Deputy Secretaries-General and staff,

51 **Article 10**

52 1. The Secretary-General and any Deputy Secretary-General shall
be elected by the Administrative Council by a majority of two-thirds
of its members upon the nomination of the Chairman for a term of
service not exceeding six years and shall be eligible for re-election.

After consulting the members of the Administrative Council, the
Chairman shall propose one or more candidates for each such of-
fice.

2. The offices of Secretary-General and Deputy Secretary-General 53
shall be incompatible with the exercise of any political function. Nei-
ther the Secretary-General nor any Deputy Secretary-General may
hold any other employment or engage in any other occupation ex-
cept with the approval of the Administrative Council.

3. During the Secretary-General's absence or inability to act, and 54
during any vacancy of the office of Secretary-General, the Deputy
Secretary-General shall act as Secretary-General. If there shall
be more than one Deputy Secretary-General, the Administrative
Council shall determine in advance the order in which they shall
act as Secretary-General.

55 **Article 11**

56 The Secretary-General shall be the legal representative and the
principal officer of the Centre and shall be responsible for its ad-
ministration, including the appointment of staff, in accordance with
the provisions of this Convention and the rules adopted by the Ad-
ministrative Council. He shall perform the function of registrar and
shall have the power to authenticate arbitral awards rendered pur-
suant to this Convention, and to certify copies thereof.

57 **SECTION 4: The Panels**

58 **Article 12**

59 The Panel of Conciliators and the Panel of Arbitrators shall each
consist of qualified persons, designated as hereinafter provided,
who are willing to serve thereon.

60	Article 13			
61	1. Each Contracting State may designate to each Panel four persons who may but need not be its nationals.			
62	2. The Chairman may designate ten persons to each Panel: The persons so designated to a Panel shall each have a, different nationality.			
63	Article 14			
64	1. Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the Fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement. Competence in the Field of law shall be of particular importance in the case of persons on the Panel or Arbitrators.			
65	2. The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.			
66	Article 15			
67	1. Panel members shall serve for renewable periods of six years.			
68	2. In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.			
69	3. Panel members shall continue in office until their successors have been designated.			
		Article 16		70
		1. A person may serve on both Panels.		71
		2. If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which First designated him or, if one such authority is the State or which he is a national, by that State.		72
		3. All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.		73
		SECTION 5: Financing the Centre		74
		Article 17		75
		If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.		76
		Section 6: Status, Immunities and Privileges		77
		The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity		78
		(a) to contract;		79
		(b) to acquire and dispose of movable and immovable property;		80
		(c) to institute legal proceedings		81

82 **Article 19**

83 To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

84 **Article 20**

85 The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

86 **Article 21**

87 The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat.

88 (a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;

89 (b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

90 **Article 22**

91 The provisions of Article 21 shall apply to persons appearing

in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

Article 23 92

1. The archives of the Centre shall be inviolable, wherever they may be. 93

2. With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favorable than that accorded to other international organizations. 94

Article 24 95

1. The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties. 96

2. Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat. 97

3. No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the 98

place where such proceedings are conducted or the place where such fees or allowances are paid.

99 CHAPTER II - Jurisdiction of the Centre

100 Article 25

101 1. The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

102 2. "National of another Contracting State" means:

103 (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

104 (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

105 3. Consent by a constituent subdivision or agency of a Contract-

ing State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

4. Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1). 106

Article 26 107

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention. 108

Article 27 109

1. No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. 110

2. Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute. 111

CHAPTER III - Conciliation**SECTION 1: Request for Conciliation****Article 28**

1. Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

2. The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

3. The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

SECTION 2: Constitution of the Conciliation Commission**Article 29**

1. The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.

2. (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist

of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

Article 30

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 31

1. Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.

2. Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

SECTION 3: Conciliation Proceedings**Article 32**

1. The Commission shall be the judge of its own competence.

2. Any objection by a party to the dispute that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by

the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

shall draw up a report noting that party's failure to appear or participate.

132 Article 33

133 Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

134 Article 34

135 1. It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavor to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.

136 If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the

137 submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and

Article 35

138 Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

CHAPTER IV - Arbitration

SECTION 1: Request for Arbitration

Article 36

143 1. Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party

144 2. The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

145 3. The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

146 **SECTION 2; Constitution of the Tribunal**147 **Article 37**148 1. The Arbitral Tribunal (hereinafter called the Tribunal) shall be
constituted as soon as possible after registration of a request pur-
suant to Article 36.149 2. (a) The Tribunal shall consist of a sole arbitrator or any uneven
number of arbitrators appointed as the parties shall agree.150 (b) Where the parties do not agree upon the number of arbitra-
tors and the method of their appointment, the Tribunal shall con-
sist of three arbitrators, one arbitrator appointed by each party and
the third, who shall be the president of the Tribunal, appointed by
agreement of the parties.151 **Article 38**152 If the Tribunal shall not have been constituted within 90 days after
notice of registration of the request has been dispatched by the
Secretary-General in accordance with paragraph (3) of Article 36,
or such other period as the parties may agree, the Chairman shall,
at the request of either party and after consulting both parties as far
as possible, appoint the arbitrator or arbitrators not yet appointed.
Arbitrators appointed by the Chairman pursuant to this Article shall
not be nationals of the Contracting State party to the dispute or of
the Contracting State whose national is a party to the dispute.153 **Article 39**154 The majority of the arbitrators shall be nationals of States other
than the Contracting State party to the dispute and the Contracting
State whose national is a party to the dispute; provided, however,that the foregoing provisions of this Article shall not apply if the
sole arbitrator or each individual member of the Tribunal has been
appointed by agreement of the parties.**Article 40** 155156 1. Arbitrators may be appointed from outside the Panel of Arbitra-
tors, except in the case of appointments by the Chairman pursuant
to Article 38.157 2. Arbitrators appointed from outside the Panel of Arbitrators shall
possess the qualities stated in paragraph (1) of Article 14.**SECTION 3: Powers and Functions of the Tribunal** 158**Article 41** 159

160 1. The Tribunal shall be the judge of its own competence.

161 2. Any objection by a party to the dispute that that dispute is not
within the jurisdiction of the Centre, or for other reasons is not within
the competence of the Tribunal, shall be considered by the Tribunal
which shall determine whether to deal with it as a preliminary ques-
tion or to join it to the merits of the dispute.**Article 42** 162163 1. The Tribunal shall decide a dispute in accordance with such
rules of law as may be agreed by the parties. In the absence of
such agreement, the Tribunal shall apply the law of the Contracting
State party to the dispute (including its rules on the conflict of laws)
and such rules of international law as may be applicable.

164 2. The Tribunal may not bring in a Finding of non liquet on the

ground of silence or obscurity of the law.

165 3. The provisions of paragraphs (1) and (2) shall not prejudice the
power of the Tribunal to decide a dispute ex aequo et bono if the
parties so agree.

166 **Article 43**

167 1. Except as the parties otherwise agree, the Tribunal may, if it
deems it necessary at any stage of the proceedings;

168 (a) call upon the parties to produce documents or other evidence,
and

169 (b) visit the scene connected with the dispute, and conduct such
inquiries there as it may deem appropriate.

170 **Article 44**

171 Any arbitration proceeding shall be conducted in accordance with
the provisions of this Section and, except as the parties otherwise
agree, in accordance with the Arbitration Rules in effect on the date
on which the parties consented to arbitration. If any question of pro-
cedure arises which is not covered by this Section or the Arbitration
Rules or any rules agreed by the parties, the Tribunal shall decide
the question.

172 **Article 45**

173 1. Failure of a party to appear or to present his case shall not be
deemed an admission of the other party's assertions.

174 2. If a party fails to appear or to present his case at any stage of
the proceedings the other party may request the Tribunal to deal
with the questions submitted to it and to render an award. Before

rendering an award, the Tribunal shall notify, and grant a period of
grace to, the party failing to appear or to present its case, unless it
is satisfied that that party does not intend to do so.

Article 46

175
176 Except as the parties otherwise agree, the Tribunal shall, if re-
quested by a party, determine any incidental or additional claims or
counter-claims arising directly out of the subject-matter of the dis-
pute provided that they are within the scope of the consent of the
parties and are otherwise within the jurisdiction of the Centre.

Article 47

177
178 Except as the parties otherwise agree, the Tribunal may, if it consid-
ers that the circumstances so require, recommend any provisional
measures which should be taken to preserve the respective rights
of either party.

SECTION 4: The Award

Article 48

181 1. The Tribunal shall decide questions by a majority of the votes of
all its members.

182 2. The award of the Tribunal shall be in writing and shall be signed
by the members of the Tribunal who voted for it.

183 3. The award shall deal with every question submitted to the Tri-
bunal, and shall state the reasons upon which it is based.

184 4. Any member of the Tribunal may attach his individual opinion

to the award, whether he dissents from the majority or not, or a statement of his dissent.

185 5. The Centre shall not publish the award without the consent of the parties.

186 **Article 49**

187 1. The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

188 2. The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article \$2 shall run from the date on which the decision was rendered.

189 **SECTION 5: Interpretation, Revision and Annulment of the Award**

190 **Article 50**

191 1. If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

192 2. The request shall, if possible, be submitted to the Tribunal which

rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

193 1. Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

194 2. The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

195 The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

196 4. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Article 52

197 198 199 1 Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- 200 (a) that the Tribunal was not properly constituted;
- 201 (b) that the Tribunal has manifestly exceeded its powers;
- 202 (c) that there was corruption on the part of a member of the Tri-
bunal;
- 203 (d) that there has been a serious departure from a fundamental rule
of procedure; or
- 204 (e) that the award has failed to state the reasons on which it is
based.
- 205 2. The application shall be made within 120 days after the date
on which the award was rendered except that when annulment is
requested on the ground of corruption such application shall be
made within 120 days after discovery of the corruption and in any
event within three years after the date on which the award was
rendered.
- 206 3. On receipt of the request the Chairman shall forthwith appoint
from the Panel of Arbitrators an ad hoc Committee of three persons.
None of the members of the Committee shall have been a member
of the Tribunal which rendered the award, shall be of the same
nationality as any such member, shall be a national of the State
party to the dispute or of the State whose national is a party to the
dispute, shall have been designated to the Panel of Arbitrators by
either of those States, or shall have acted as a conciliator in the
same dispute. The Committee shall have the authority to annul
the award or any part thereof on any of the grounds set forth in
paragraph (1).
- 207 4. The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chap-
ters VI and VII shall apply mutatis mutandis to proceedings before
the Committee.
- 208 5. The Committee may, if it considers that the circumstances so
require, stay enforcement of the award pending its decision. If the

applicant requests a stay of enforcement of the award in his appli-
cation, enforcement shall be stayed provisionally until the Commit-
tee rules on such request.

6. If the award is annulled the dispute shall, at the request of either 209
party, be submitted to a new Tribunal constituted in accordance
with Section 2 of this Chapter.

SECTION 6: Recognition and Enforcement of the 210 Award

Article 53 211

1. The award shall be binding on the parties and shall not be sub- 212
ject to any appeal or to any other remedy except those provided
for in this Convention. Each party shall abide by and comply with
the terms of the award except to the extent that enforcement shall
have been stayed pursuant to the relevant provisions of this Con-
vention.

2. For the purposes of this Section, "award" shall include any de- 213
cision interpreting, revising or annulling such award pursuant to
Articles 50, 51 or 52.

Article 54 214

1. Each Contracting State shall recognize an award rendered pur- 215
suant to this Convention as binding and enforce the pecuniary obli-
gations imposed by that award within its territories as if it were a
final judgment of a court in that State. A Contracting State with
a federal constitution may enforce such an award in or through
its federal courts and may provide that such courts shall treat the
award as if it were a final judgement of the courts of a constituent
state.

216 2. A party seeking recognition or enforcement in the territories of
a Contracting State shall furnish to a competent court or other au-
thority which such State shall have designated for this purpose a
copy of the award certified by the Secretary-General. Each Con-
tracting State shall notify the Secretary-General of the designation
of the competent court or other authority for this purpose and of
any subsequent change in such designation.

217 3- Execution of the award shall be governed by the laws concerning
the execution of judgments in force in the State in whose territories
such execution is sought.

218 **Article 55**

219 Nothing in Article 54 shall be construed as derogating from the law
in force in any Contracting State relating to immunity of that State
or of any foreign State from execution.

220 **CHAPTER V - Replacement and Disqualification of Conciliators and Arbitrators**

221 **Article 56**

222 1. After a Commission or a Tribunal has been constituted and
proceedings have begun, its composition shall remain unchanged;
provided, however, that if a conciliator or an arbitrator should die,
become incapacitated, or resign, the resulting vacancy shall be
filled in accordance with the provisions of Section 2 of Chapter III
or Section 2 of Chapter IV.

223 2. A member of a Commission or Tribunal shall continue to serve
in that capacity notwithstanding that he shall have ceased to be a
member of the Panel.

224 3. If a conciliator or arbitrator appointed by a party shall have re-

signed without the consent of the Commission or Tribunal of which
he was a member, the Chairman shall appoint a person from the
appropriate Panel to fill the resulting vacancy.

225 **Article 57**

226 A party may propose to a Commission or Tribunal the disqualifi-
cation of any of its members on account of any fact indicating a
manifest lack of the qualities required by paragraph (1) of Article
14. A party to arbitration proceedings may, in addition, propose
the disqualification of an arbitrator on the ground that he was inel-
igible for appointment to the Tribunal under Section 2 of Chapter
IV.

227 **Article 58**

228 The decision on any proposal to disqualify a conciliator or arbitra-
tor shall be taken by the other members of the Commission or Tri-
bunal as the case may be, provided that where those members
are equally divided, or in the case of a proposal to disqualify a sole
conciliator or arbitrator, or a majority of the conciliators or arbitra-
tors, the Chairman shall take that decision. If it is decided that the
proposal well-founded the conciliator or arbitrator to whom the de-
cision relates shall be replaced in accordance with the provisions
of Section 2 of Chapter III or Section 2 of Chapter IV.

229 **CHAPTER VI - Cost of Proceedings**

230 **Article 59**

231 The charges payable by the parties for the use of the facilities of
the Centre shall be determined by the Secretary-General in accor-

dance with the regulations adopted by the Administrative Council. 238

CHAPTER VII - Place of Proceedings

Article 62 239

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided. 240

Article 60 232

1. Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General. 233

Article 63 241

Conciliation and arbitration proceedings may be held, if the parties so agree, 242

2. Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members. 234

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or 243

Article 61 235

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General. 244

1. In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings. 236

CHAPTER VIII - Disputes between Contracting States 245

2. In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award. 237

Article 64 246

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement. 247

CHAPTER IX - Amendment**Article 65**

250 Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

Article 66

251 If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be Circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depository of the Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

CHAPTER X

Final Provisions

Article 67

256 This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

248 **Article 68**

249 1. This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

2. This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Article 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

Article 70

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depository of this Convention either at the time of ratification, acceptance or approval or subsequently.

Article 71

Any Contracting State may denounce this Convention by written notice to the depository of this Convention. The denunciation shall take effect six months after receipt of such notice.

Article 72

267 Notice by Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

- 266 (c) the date on which this Convention enters into force in accordance with Article 68; 274
- (d) exclusions from territorial application pursuant to Article 70; 275
- (e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and 276
- (f) denunciations in accordance with Article 71. 277

Article 73

268 Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

[Post Provisions]**[Post Clauses (If any: Signed; Witnessed; Done; Authentic Texts; & Deposited Clauses)]**

DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfil the functions with which it is charged under this Convention. 278

[Article 74]

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

Article 74 [Article 75]

- 270 The depositary shall notify all signatory States of the following:
- 271
- 272 (a) signatures in accordance with Article 67;
- 273 (b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;

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**International Centre for
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Chapter V Particular Procedures

Rule 39 Provisional Measures

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Rule 40 Ancillary Claims

(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

International Centre for Settlement of Investment Disputes

Burlington Resources Inc. and others
CLAIMANTS

v.

Republic of Ecuador
and
Empresa Estatal Petróleos del Ecuador (PetroEcuador)
RESPONDENTS

ICSID Case No. ARB/08/5

PROCEDURAL ORDER No. 1
on Burlington Oriente's Request for Provisional Measures

Rendered by an Arbitral Tribunal composed of:
Prof. Gabrielle Kaufmann-Kohler, President
Prof. Brigitte Stern, Arbitrator
Prof. Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal
Marco Tulio Montañés-Rumayor

Date: June 29, 2009

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I. FACTUAL AND PROCEDURAL BACKGROUND**A. Subject matter of this Order**

1. The present order deals with a request for provisional measures, by which Burlington Resources Oriente Limited ("Burlington Oriente"; to the exclusion of the other Claimants in this arbitration) seeks the following relief from the Arbitral Tribunal:
 - (i) that Ecuador and PetroEcuador and/or their agencies or entities refrain from demanding payment of amounts allegedly due under Law No. 2006-42 and commencing any action or adopting any resolution or decision that may directly or indirectly lead to the forced or coerced payment of any amount relating to Law No. 2006-42;
 - (ii) that Ecuador and PetroEcuador and/or their agencies or entities refrain from making or implementing any measure, decision or resolution which directly or indirectly affects the legal situation of or is intended to terminate the Block 7 and 21 PSCs; and
 - (iii) that Ecuador and PetroEcuador and/or their agencies or entities refrain from engaging in any other conduct that aggravates the dispute between the parties and/or alters the status quo, including commencing any action or adopting any resolution or decision that directly or indirectly affects the legal or physical integrity of Burlington Oriente's representatives.

B. Origin of the dispute

2. The present dispute originates from two production sharing contracts ("PSCs") for the exploration and exploitation of oil fields in the Amazon Region. The first contract relates to Block 7. It was concluded on 23 March 2000 between Kerr McGee Ecuador Energy Corporation, Preussag Energie GMBH, Sociedad Internacional Petrolera S.A., Compañía Latinoamericana Petrolera Numero Dos S.A., on the one hand and the Republic of Ecuador ("Ecuador") by the intermediary of Empresa Estatal Petróleos del Ecuador ("PetroEcuador"), on the other hand (the "Block 7 PSC"). The second contract relates to Block 21. It was concluded on 20 March 1999 between Oryx Ecuador Energy Company, Santa Fe Minerales del Ecuador S.A., Sociedad Internacional Petrolera S.A. and Compañía

Latinoamericana Petrolera S.A., on the one hand, and Ecuador by the intermediary of PetroEcuador, on the other hand (the "Block 21 PSC"). Burlington Resources Oriente Limited ("Burlington Oriente") alleges that it now holds a 42.5% interest in the Block 7 PSC and a 46.25% interest in the Block 21 PSC, an allegation that remained unchallenged. Perenco Ecuador Limited ("Perenco") is the operator of Blocks 7 and 21.

3. Both PSCs contain tax stabilization clauses, a choice of Ecuadorian law, and an ICSID arbitration clause.
4. According to its Article 6(2), the Block 7 PSC will expire on 16 August 2010. By contrast, pursuant to Articles 6(2)(5) and 6(3) of the Block 21 PSC, the period of exploitation for such PSC is twenty (20) years from the date of authorization of PetroEcuador, *i.e.* allegedly until 2021, being specified that by letter of 24 December 2008 (Exhibit C49) the Ministry of Energy and Mines invited Perenco to appoint a negotiating team for the early termination of Block 21 PSC (as confirmed by the Ministry's letter of 26 January 2009 – Exhibit E3).
5. Burlington Oriente and Perenco formed a Consortium, which is responsible for the tax obligations derived from the PSCs.
6. On 19 April 2006, Ecuador enacted Law No. 2006-42 ("Law 42"), which amended the Hydrocarbons Law of Ecuador as follows:

"[c]ontracting companies having Hydrocarbons exploration and exploitation participation agreements in force with the Ecuadorian State pursuant to this Law, without prejudice to the volume of crude oil which may correspond thereto according to their participation, in the event the actual monthly average selling price for the FOB sale of Ecuadorian crude oil exceeds the monthly average selling price in force at the date of subscription of the agreement expressed at constant rates for the month of payment, **shall grant the Ecuadorian State a participation of at least 50% over the extraordinary revenues caused by such price difference [...]."** (Exhibit C7, Article 2; emphasis added)
7. Decrees Nos. 1583 (29 June 2006) and 1672 (13 July 2006) spelled out the method of calculation of such 50% participation. From the record, it appears that the "*reference price*" (that is "*the monthly average selling*

price in force at the date of subscription of the agreement expressed at constant rates for the month of payment) is USD 25 per barrel for Block 7 (Transcript, p.163) and USD 15 per barrel for Block 21 (Exhibit C41). In other words, if *"the actual monthly average selling price for the FOB sale of Ecuadorian crude oil"* amounted for instance to USD 40, Ecuador's participation would be 50% of USD 15, *i.e.* USD 7.5, for Block 7 and 50% of USD 25, *i.e.* USD 12.5, for Block 21.

8. On 18 October 2007, Ecuador published Decree No. 662 ("Decree 662"; from here, any reference to Law 42 includes Decree 662 unless otherwise specified), which amended Decree No. 1672 and increased the participation on *"extraordinary revenues"* pursuant to Law 42 from 50 percent to 99 percent. Using the same example as in the preceding paragraph, Ecuador's participation would be 99% of USD 15, *i.e.* USD 14.85, for Block 7 and 99% of USD 25, *i.e.* 24.75, for Block 21 crude.

9. From the enactment of Law 42 until June 2008, *i.e.* during eighteen months after the adoption of Law 42 and eight months after Decree 662, the Consortium made the payments due under these texts to the State (hereinbelow, the expression "Law 42 payments" will include payments under Decree 662, unless otherwise specified). Specifically, by June 2008, the Consortium alleges that it *"had made Law No. 2006-42 payments for Block 7 and 21 to Ecuador in excess of US\$396.5 million"* (Request for provisional measures, para.25).
10. Thereafter, the Consortium ceased to make such payments to the Respondent. Instead, it deposited the monies owed under Law 42 (and Decree 662) in an alleged total amount of USD 327.4 million (USD 171.7 million for Block 7 and USD 155.7 million for Block 21) into two segregated accounts, over which it keeps control.
11. Following the decision of Burlington Oriente to reject Ecuador's proposal to amend the Block 7 and 21 PSCs, Ecuador allegedly threatened to seize assets of the Consortium in order to collect unpaid amounts relating to Law 42 and to terminate the Block 7 and Block 21 PSCs. Notices were

served by PetroEcuador on Perenco (Exhibit C55), in order to collect monies in the amount of USD 327,467,447.00 million (for the entire Consortium).

12. On 19 February 2009, Ecuador and PetroEcuador (through the Executory Tribunal of PetroEcuador) instituted so-called *coactiva* proceedings to enforce the payment of USD 327,467,447.00, corresponding to the Consortium's allegedly unpaid amounts under Law 42.
13. On 25 February 2009, PetroEcuador proceeded to serve its third notice of the *coactiva* process on Perenco, which filed an action before the Civil Judge of Pichincha against any further actions that could be taken within the *coactiva* process¹.
14. On 3 March 2009, the *coactiva* administrative tribunal ordered the immediate seizure of all Block 7 and 21 crude production and cargos produced by Perenco, which decision was confirmed by the Civil Judge of Pichincha on 9 March 2009 (Exhibit C60).
15. At the hearing, Burlington Oriente asserted that the "[coactiva judge] *elected to treat it [the debt for payments under Law 42] as if it was res judicata, and then went ahead, seized the assets, and auctioned off – and auctioned them off for payment.*" (Transcript, pp.27-8). The Respondents did not rebut such statement. They had actually stated in a letter of 3 March 2009 that "*steps have been, or will imminently be, taken by the 'coactivas judge' to seize certain assets in satisfaction of the debts claimed in C-55 to Burlington Oriente's Request for Provisional Measures*". Although no amounts were specified, there is no dispute that Ecuador has seized certain quantities of oil produced by Burlington. By contrast, it has not been shown that other assets such as production equipment have been seized.

¹ It is unclear whether Perenco alone, or the whole Consortium (as stated by the Respondent, see para.40 of the Rejoinder) filed an action before the Ecuadorian courts.

C. Request for arbitration

16. On 21 April 2008, Burlington Resources Inc., Burlington Oriente, Burlington Resources Andean Limited and Burlington Resources Ecuador Limited filed a Request for arbitration with ICSID. They asked for the following relief:

“(a) DECLARE that Ecuador has breached:

- (i) Article III of the Treaty [between the United States and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment] by unlawfully expropriating and/or taking measures tantamount to expropriation with respect to Burlington’s investments in Ecuador;
 - (ii) Article II of the Treaty by failing to treat Burlington’s investments in Ecuador on a basis no less favorable than that accorded nationals; by failing to accord Burlington’s investments fair and equitable treatment, full protection and security and treatment no less than that required by international law; by implementing arbitrary and discriminatory measures against Burlington’s investments; and
 - (iii) Each of the PSCs;
- (b) ORDER Ecuador: (i) to pay damages to Burlington for its breaches of the Treaty in an amount to be determined at a later stage in these proceedings, including payment of compound interest at such a rate and for such period as the Tribunal considers just and appropriate until the effective and complete payment of the award of damages for the breach of the Treaty; and/or (ii) to specific performance of its obligations under the PSCs and pay damages for its breaches of the PSCs in an amount to be determined at a later stage in the proceedings, including interest at such a rate as the Tribunal considers just and appropriate until the complete payment of all damages for breach of the PSCs.
- (c) AWARD such other relief as the Tribunal considers appropriate; and
- (d) ORDER Ecuador to pay all of the costs and expenses of this arbitration, including Burlington’s legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID’s other costs”.

D. Procedural history

17. On 20 February 2009, Burlington Oriente filed a Request for provisional measures (the “Request”).

18. The Request was accompanied by a number of exhibits, including a witness statement from Mr. Alex Martinez. It included a request for a temporary restraining order with immediate effect.
19. On 23 February 2009, the First Respondent (Ecuador) filed a response to the Claimant's request for a temporary restraining order. It in particular undertook "*to serve prior notice on the Tribunal, granting enough time for the Tribunal to act as necessary, before it takes any measure that seeks to enforce the debts claimed in exhibit C-55 to the request for Provisional Measures*". On the basis of this undertaking, the Tribunal considered that it could dispense with reviewing whether a temporary order with immediate effect was justified pending determination of the application for provisional measures.
20. Burlington Oriente renewed its request for a temporary restraining order on 25 February 2009 alleging that the third *coactiva* notice had been given and that three days thereafter the Respondents could start seizing assets. The First Respondent replied on 26 February 2009 and reiterated its undertaking.
21. On 27 February 2009, the Arbitral Tribunal again resolved that there was no need to rule on Burlington Oriente's request in view of Ecuador's repeated assurances.
22. On 3 March 2009, Burlington Oriente again repeated its request for a temporary restraining order, owing to the alleged imminence of the seizures of Burlington Oriente's assets pursuant to two orders issued by the *coactiva* tribunal on 3 March 2009.
23. On 4 March 2009, the First Respondent filed a preliminary reply to Burlington Oriente's Request for provisional measures (the "Preliminary Reply").
24. On 6 March 2009, in light of the information received three days earlier, the Arbitral Tribunal recommended "*that the Respondents refrain from engaging in any conduct that aggravates the dispute between the Parties*

and/or alters the status quo until it decides on the Claimants' Request for Provisional Measures or it reconsiders the present recommendation, whichever is first." In issuing such recommendation, the Arbitral Tribunal considered that the requirements of urgency and of necessity were met. It in particular considered that Burlington Oriente's right to have its interests effectively protected by way of provisional measures was sufficient to demonstrate necessity in the circumstances.

25. The First Respondent filed its Reply to Burlington Oriente's Request for provisional measures (the "Reply"), together with a Request for reconsideration of the Tribunal's recommendation of 6 March 2009, on 17 March 2009. On 25 March 2009, the Claimant filed a Reply to the First Respondent's request for reconsideration of the Tribunal's recommendation on 25 March 2009. The Arbitral Tribunal denied the First Respondent's request for reconsideration on 3 April 2009 on the ground that no changed circumstances called for reconsideration and that the hearing on provisional measures was to take place shortly thereafter.
26. The Claimants filed their Response to Ecuador's Replies to the Request for provisional measures on 27 March 2009 (the "Response") and the Respondent filed their Rejoinder to Burlington Oriente's Request for provisional measures on 6 April 2009 (the "Rejoinder").
27. The hearing on provisional measures took place on 17 April 2009 in Washington, D.C. It was attended by the following persons:

Members of the Tribunal

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Professor Brigitte Stern, Arbitrator
Professor Francisco Orrego Vicuña, Arbitrator

ICSID Secretariat

Mr. Marco T. Montañés-Rumayor, Secretary of the Tribunal

Representing the Claimants

Ms. Aditi Dravid, ConocoPhillips Company
 Mr. Alex Martínez, Burlington Resources Oriente Limited
 Mr. Alexander Yanos, Freshfields Bruckhaus Deringer US LLP
 Ms. Noiana Marigo, Freshfields Bruckhaus Deringer US LLP
 Mr. Viren Mascarenhas, Freshfields Bruckhaus Deringer US LLP
 Mr. Javier Robalino-Orellana, Pérez Bustamante & Ponce Abogados
 Cía Ltda.

Representing First Respondent Republic of Ecuador

Mr. Alvaro Galindo Cardona, Director de Patrocinio Internacional
 Procuraduría General del Estado
 Mr. Juan Francisco Martínez, Procuraduría General del Estado
 Mr. Felipe Aguilar, Procuraduría General del Estado
 Mr. Eduardo Silva Romero, Dechert LLP
 Mr. George K. Foster, Dechert LLP
 Mr. José Manuel García Represa, Dechert LLP

Representing Second Respondent PetroEcuador

Dr. José Murillo Venegas, Empresa Estatal Petróleos del Ecuador
 Dr. Wilson Narváez, Empresa Estatal Petróleos del Ecuador

At the hearing, the Tribunal heard the Parties' oral arguments as well as the testimony of Mr. Martinez. A transcript was made in English and Spanish and distributed to the Parties.

II. PARTIES' POSITIONS

A. Claimant's position

28. The Claimant argues that the test to be applied to provisional measures is twofold: urgency and necessity to spare significant harm to a Party's rights.
29. It understands the first requirement of urgency in a broad fashion that includes situations in which protection cannot wait until the award. In the

present case, it submits that urgency arises out of the Respondents' plan to enforce all amounts due under Law 42.

30. With respect to necessity, the Claimant stresses that the distinction between "significant" and "irreparable" harm does not entail consequences in the present case. According to the Claimant, irreparable harm is not required under the ICSID Convention or international law, and a broad meaning has been given to the phrase by a number of international tribunals (*Paushok v. Mongolia*, *City Oriente v. Ecuador*, *Saipem v. Bangladesh*). It further submits that ICSID arbitral tribunals have interpreted "*necessity*" for provisional measures not so much as a need to prevent "*irreparable*" harm but as a need to spare "*significant harm*". According to the Claimant, ICSID tribunals have also given careful consideration to the proportionality of the measures when considering if they are necessary.

31. The Claimant argues that necessity exists here in three respects:
- (i) Provisional measures are necessary to preserve the Claimant's rights under Article 26 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules pursuant to which "[...] *once the parties have consented to ICSID arbitration, they cannot resort to other forums in respect to the subject matter of the dispute before the ICSID Tribunal.*" (Response, para.32). The Claimant contends that through the *coactiva* proceedings, the Respondents seek provisional relief against it in contravention to the said rights.
 - (ii) Provisional measures are necessary to protect Burlington Oriente's independent right to specific performance of the Block 7 and 21 PSCs. The right to specific performance exists under Ecuadorian law, as provided by Article 1505 of the Ecuadorian Civil Code and confirmed by the Supreme Court of Ecuador in the case of *Tecco v. IEOS*. The Claimant also argues that Burlington Oriente's right to specific performance would not survive termination of the PSCs and that it is a property right that deserves protection to prevent its dissipation or destruction. The Claimant substantially argues that the Respondents' measures will irreversibly end Burlington Oriente's actual right to seek specific performance of the PSCs by effectively terminating them.
 - (iii) Provisional measures are necessary to protect Burlington Oriente's self-standing rights to the preservation of the *status quo*, non-

aggravation of the dispute, and preservation of the award. These rights are in danger of being irreparably harmed by the actions of the Respondents. In particular, according to the Claimant, the enforcement of Law 42 would alter the *status quo* and aggravate the dispute, as well as frustrate the effectiveness of the award, particularly of an award of specific performance.

32. The Claimant adds that its request for provisional measures not only responds to the necessity criterion, but also fulfills the proportionality requirement. They point out that “[s]ince Ecuador has not enforced Law No. 2006-42 since June 2008, when the Consortium began depositing it into a segregated account, no additional burden would be imposed upon Ecuador if the Tribunal authorized the Consortium or Burlington Oriente to continue paying such amounts into a segregated account or into an official escrow account.” (Request, para.74).
33. The Arbitral Tribunal further notes the statement made by Mr. Alex Martinez, a member of the Board of Directors for Burlington Oriente and Latin America Partnership Operations and Peru Opportunity Manager for ConocoPhillips Corporation, according to whom “[i]f Ecuador indeed seizes the production assets of the Perenco-Burlington Oriente Consortium and/or the oil produced by the consortium, Burlington Oriente will be forced to exit Blocks 7 and 21 as it will be forced in this context to spend money to produce oil for the sole benefit of PetroEcuador” (Witness Statement of Alex Martinez, para.10).

B. Respondents’ position

34. In its Preliminary Reply, Reply and Rejoinder, the First Respondent (Ecuador) set out its arguments against the Claimant’s Request. The Second Respondent (PetroEcuador) stated in its letters of 31 March, 2 and 6 April 2009 that it opposed the Claimant’s Request and agreed with the position of the Republic of Ecuador, as expressed in the submissions just referred to. Therefore, the Arbitral Tribunal will thereafter refer to the position expressed in the First Respondent’s submissions as that of both Respondents (on the admissibility of PetroEcuador’s opposition to the Request, see para.43).

35. The Respondents state at the outset of their submissions that the Claimant's acts against the enforcement of a valid Ecuadorian law constitute an interference with the sovereignty of Ecuador. They further contend that a presumption of validity exist in favor of legislative measures adopted by a State, that any loss might be compensated by an award of damages and interest, and that the Claimant admits that it could meet its obligations to pay the disputed amounts, since it stated to have set aside the relevant amounts in U.S. accounts. The Respondents also state that the Claimant's Request is neither urgent nor necessary.
36. The Respondents stress that the applicable test for granting provisional measures is the existence of an urgent need to avoid irreparable prejudice, in accordance with ICJ practice. In particular, they stress that no ICSID tribunal has ever rejected the criterion of "irreparable" harm to the benefit of "significant" harm. They further state that Burlington Oriente's reliance on *Paushok v. Mongolia* and *City Oriente v. Ecuador* is misplaced, as in the latter case, irreparable harm was met on the facts and, in the former, the arbitral tribunal recognized that it went against the weight of authorities.
37. Furthermore, the Respondents understand urgency as follows: "[...] *action prejudicial to the rights of Burlington Oriente is likely to be taken before the Tribunal can finally decide on the merits of the dispute submitted to it.*" (Preliminary Reply, para. 8). The Respondents also state that "*Burlington Oriente's reliance on a so-called 'proportionality test' confuses the issue*" (Preliminary Reply, para.52).
38. The Respondents do not see the need for protection against the termination of the PSCs as urgent, since Ecuador confirmed on 23 February 2009 to the Arbitral Tribunal that none of the Respondents had taken steps to this effect.
39. The Respondents further opposed the Claimant's arguments asserting that Burlington Oriente has not identified any substantive right requiring preservation through provisional measures:

- (i) The *coactiva* process does not threaten the Claimants' rights under Article 26 of the ICSID Convention and Rule 39(6) of the ICSID Arbitration Rules. Such process is an administrative not a judicial proceeding. Consequently, it does not involve the determination of any of the matters at issue in this arbitration. The only judicial proceedings before the Ecuadorian courts (namely the proceedings in front of the Civil Court of Pichincha) were initiated by the Claimants, and not by any of the Respondents.
- (ii) Burlington Oriente has no right to specific performance of the PSCs, let alone one that would be irreparably harmed absent provisional relief. It has not established that Ecuador actually intended to terminate the PSCs. To the contrary, the government "***expressly disavowed any such intention.***" (Rejoinder, para.21, with emphasis). Even if Ecuador had such intent, Burlington Oriente would still have no right to specific performance under international law. As for Ecuadorian law, it does not recognize a right to specific performance when the subject matter of the obligation is contrary to the law, which would be the case here because the enforcement of the PSCs would breach Law 42. Moreover, there is no more basis for a tribunal to restrain a sovereign State from terminating a contract than to order a State to reinstate a contract after termination.
- (iii) The preservation of the *status quo*, the non-aggravation of the dispute, and the preservation of the effectiveness of the award are not free standing rights in international law, independent from contractual or treaty rights. The preservation of the *status quo* is one of the purposes to be served by preserving rights under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules by way of provisional measures. Even if it had a right to the preservation of the *status quo*, Burlington Oriente is the one who altered this *status quo* by ceasing to pay the amounts due to Ecuador. Finally, there is no risk that the enforcement of Law 42 aggravates the dispute or renders any future award ineffective, since the dispute can easily be resolved through a monetary award.

40. The Respondents further argue that the Claimant's allegations about a threat to the physical and legal integrity of Burlington's representatives is unparticularised and should therefore be rejected.

III. DISCUSSION

41. The Tribunal will first deal with some preliminary matters (A). Thereafter, it will address the standards applicable to provisional measures in general (B), before reviewing each such standards, *i.e.* the existence of right (C),

urgency (D), and necessity or the need to avoid harm (E). It will finally deal with the issue of the escrow account (F) before setting forth its decision (IV).

A. PRELIMINARY MATTERS

42. The Arbitral Tribunal will first deal with a few procedural issues which arose during the hearing of 17 April and in the course of previous written exchanges, namely the timeliness of PetroEcuador's opposition to the Request; Burlington Oriente's use of an alleged statement by President Correa; and the request for relief regarding the alleged threat to the legal and physical integrity of the Claimant's representatives.
43. Burlington Oriente argues that PetroEcuador's endorsement of Ecuador's position on 31 March 2009 (confirmed on 1 and 6 April 2009 and repeated at the hearing, Transcript, p.9) was untimely and should thus not be considered. PetroEcuador attended the hearing without presenting oral argument of its own in accordance with the Tribunal's understanding set out in the latter's letter of 8 April 2009. Since PetroEcuador made no written or oral submissions of its own, but for its adhesion to Ecuador's case, the fact that such adhesion did not respect the briefing schedule did not affect the Claimant's due process rights. The Tribunal would thus find it excessively formalistic to disregard PetroEcuador's endorsement of the First Respondent's position.
44. As a second preliminary matter, the Respondents object to Burlington Oriente's reliance at the hearing on a statement by President Correa in 2008 (Transcript, p.21). Since evidence of such a statement was not in the record then, the Arbitral Tribunal will not consider it for purpose of this decision.
45. As a third preliminary matter, the Respondents submit that Burlington Oriente's request for relief based on the threat to the legal and physical integrity of its representatives has been abandoned (Transcript, pp.90-91). The Arbitral Tribunal indeed notes that Burlington Oriente has not opposed such submission at the hearing. Be this as it may, the allegation of threats

is in any event unsubstantiated Hence, the Tribunal will not further entertain it.²

46. As a final observation within these preliminary matters, the Tribunal notes that this order is made on the basis of its understanding of the record as it stands now. Nothing herein shall preempt any later finding of fact or conclusion of law.

B. APPLICABLE STANDARDS

1. Legal framework

47. The relevant rules are found in Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, which are generally considered to grant wide discretion to the Arbitral Tribunal.

48. Article 47 of the ICSID Convention provides that

“[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the specific rights of either party.”

49. Rule 39 of the ICSID Arbitration Rules reads as follows:

- (1) “At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

² See, for a similar approach, *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on provisional measures of 17 August 2007, para. 89: “In other words, Claimants are asking a provisional measure in order to avoid a behaviour, which they are not even sure to be intended. This is not the purpose of a provisional measure. Provisional measures are not deemed to protect against any potential and hypothetical harm susceptible to result from uncertain measures, they are deemed to protect the requesting party from an imminent harm.”

- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

[...]"

It is undisputed by the Parties that the Arbitral Tribunal has the power to order provisional measures prior to ruling on its jurisdiction. The Tribunal will not exercise such power, however, unless there is *prima facie* basis for jurisdiction.

50. The provisional measures were requested by Burlington Oriente, *i.e.* one of the so-called "*Burlington subsidiaries*" (Request for Arbitration, para.1). The "*Burlington subsidiaries*" (that is Burlington Oriente, Burlington Resources Ecuador Limited and Burlington Resources Andean Limited) seek compensation for the Respondents' breach of the PSCs (Request for Arbitration, para.3). As far as Burlington's subsidiaries are concerned, the Claimants assert that ICSID has jurisdiction on the basis of the arbitration clauses embodied in Section 20.3 of the Block 7 PSC and Section 20.2.19 of the Block 21 PSC:

"By the express language of the PSCs for Blocks 7, 21 and 23, the parties consented to ICSID jurisdiction from the moment the ICSID Convention was ratified by Ecuador. Ecuador ratified the ICSID Convention on February 7, 2001. Thus, since February 7, 2001, all parties to the PSCs for Blocks 7, 21 and 23 have consented to ICSID arbitration to resolve the dispute set forth herein." (Request for Arbitration, para.131).

Hence, the Tribunal considers that it has *prima facie* jurisdiction for purposes of rendering this order.

2. Requirements for provisional measures

51. There is no disagreement between the Parties, and rightly so, that provisional measures can only be granted under the relevant rules and standard if rights to be protected do exist (C below), and the measures are urgent (D below) and necessary (E below), this last requirement implying an assessment of the risk of harm to be avoided by the measures. By contrast, the Parties differ on the nature of such harm. The Claimant argues that significant harm is sufficient, while the Respondents insist on

irreparable harm. The Parties further disagree on the type and existence of the rights to be protected. The Tribunal will now review the different requirements for provisional measures just set out and the Parties' divergent positions in this respect.

C. EXISTENCE OF RIGHTS

52. Burlington Oriente asserts that three types of rights need protection by way of provisional measures, namely the right to exclusive recourse to ICSID under Article 26 of the ICSID Convention (1); the rights to the preservation of the *status quo*, the non-aggravation of the dispute and the effectivity of the arbitral award (2); and the right to specific performance of the PSCs (3).
53. At the outset, one notes the Parties' concurrent view that the Tribunal must examine the existence of rights under a *prima facie* standard (Transcript, p.169, 179-80, 199). It cannot require actual proof, but must be satisfied that the rights exist *prima facie*.

1. Right to exclusivity under Article 26 ICSID Convention

54. In the first place, Burlington Oriente substantially argues that provisional measures are necessary to preserve the exclusivity of ICSID proceedings under Article 26 of the ICSID Convention, which in essential part provides that “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”
55. The Claimant submits that matters at issue in the present case are being adjudicated in the *coactiva* process. The Respondents reply that the *coactiva* proceeding is an administrative not a judicial process, that it carries no *res judicata*, and does not preempt the determination of the dispute by this Tribunal.

56. In the Tribunal's view, two questions arise here. First, does a right to the exclusive jurisdiction of ICSID exist as a right that can be protected through provisional measures? If the answer is positive, the second question that arises is whether that right is at risk under the circumstances if no provisional measures are granted.

57. The Tribunal has no doubt about the existence of a right to exclusivity susceptible of protection by way of provisional measures, or in the words of the *Tokios Tokelés v. Ukraine* tribunal:

"Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative."³

58. The existence of such a right being accepted, is the continuation of the *coactiva* process susceptible of putting this right at risk? There is conflicting argumentation on record about the true legal nature and the subject matter of the *coactiva* process (Transcript, pp. 26-7, 49-63, 116-30). The Tribunal is thus unable to come to a conclusion on this issue in the context of this Order. Hence, for purposes of the present limited review, it cannot but hold that Burlington Oriente has not established a *prima facie* case of breach of Article 26 of the ICSID Convention.

2. Right to the preservation of the *status quo* and non-aggravation of the dispute

59. Second, Burlington Oriente asserts rights to the preservation of the *status quo*, the non-aggravation of the dispute, and the preservation of the award. The Respondents object that these are neither rights under Article 47 of the ICSID Convention nor free standing rights under international law and that the Claimant can only seek measures that protect the substantive rights in dispute.

60. In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or

³ *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Order No. 3 of 18 January 2005, para. 7, citation omitted.

substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the *status quo* and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.

61. The Tribunal will now review the right to the preservation of the *status quo* and the non-aggravation of the dispute. Such right focuses on the situation at the time of the measures. By contrast, the right to the protection of the effectivity of the award looks into the future. As such, under the circumstances of this case, it is closely linked with the right to specific performance. The discussion on such latter right, to which the Tribunal refers later in this Order, thus equally disposes of the issue of the protection of the award.
62. The existence of the right to the preservation of the *status quo* and the non-aggravation of the dispute is well-established since the case of the *Electricity Company of Sofia and Bulgaria*⁴. In the same vein, the *travaux préparatoires* of the ICSID Convention referred to the need “to preserve the *status quo* between the parties pending [the] final decision on the merits” and the commentary to the 1968 edition of the ICSID Arbitration Rules explained that Article 47 of the Convention “is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award”⁵.
63. In ICSID jurisprudence, this principle was first affirmed in *Holiday Inns v. Morocco*⁶ and then reiterated in *Amco v. Indonesia*. In the latter case, the tribunal acknowledged “the good and fair practical rule, according to which both Parties to a legal dispute should refrain, in their own interest, to do

⁴ *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B, No 79, p.199. See also the *LaGrand case (Germany v. United States)*, Judgment of 27 June 2001, para. 103, ICJ Reports 2001, p.466.

⁵ 1 ICSID Reports 99.

⁶ *Holiday Inns S.A. and others v. Kingdom of Morocco* (ICSID Case No. ARB/72/1), Order of 2 July 1972, not public but commented in Pierre Lalive, “The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco) – Some Legal Problems”, BYIL, 1980.

*anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult*⁷.

64. The principle was re-affirmed in *Plama v. Bulgaria*⁸ (although with a somewhat more limited approach), *Occidental v. Ecuador*⁹, and *City Oriente v. Ecuador*¹⁰.
65. There is no doubt in the Tribunal's mind that the seizures of the oil production decided in the *coactiva* proceedings are bound to aggravate the present dispute. At present, both PSCs are in force and, subject to the controversy about the Law 42 payments, appear to be performed in accordance with their terms. If the seizures continue, it is most likely that the conflict will escalate and there is a risk that the relationship between the foreign investor and Ecuador may come to an end.
66. In making this finding, the Tribunal understands Ecuador's arguments about its duties to enforce its municipal law and in particular Law 42. Yet, the ICSID Convention allows an ICSID tribunal to issue provisional measures under the conditions of Article 47. Hence, by ratifying the ICSID Convention, Ecuador has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.
67. The Tribunal is also mindful of the Respondents' argument that Burlington Oriente is the one who altered the *status quo* by ceasing to pay the amounts due to Ecuador. It cannot, however, follow this argument. Indeed, the *status quo* at issue, the one that needs protection – provided the other requirements are met – consists in the continuation of the cooperation between the Parties in the framework of the PSCs.

⁷ *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on request for provisional measures of 9 December 1983, ICSID Reports, 1993, p.412.

⁸ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/04), Order of 6 September 2005, para.40.

⁹ *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on provisional measures of 17 August 2007, para.96.

¹⁰ *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/06/21), Decision on provisional measures of 19 November 2007, para.55.

68. In conclusion, the Tribunal holds that Burlington Oriente has shown the existence of a right to preservation of the *status quo* and the non-aggravation of the dispute.

3. Right to specific performance (and to the preservation of the effectivity of the award)

69. Third, the Claimant asserts a right to specific performance of the PSCs and to the protection of the effectivity of an award that may sanction such right. It is disputed whether specific performance is admissible under Ecuadorian and international law.

70. With respect to international law, Article 35 of the ILC Articles on State responsibility provide for restitution which includes specific performance unless it is materially impossible or wholly disproportionate¹¹. Whether specific performance is impossible or disproportionate is a question to be dealt with at the merits stage. It is true that the view has been expressed that the right to specific performance is not available under international law where a concession agreement for natural resources has been terminated or cancelled by a sovereign State. In the instant case, the PSCs are in force which makes it unnecessary to consider that view. As far as Ecuadorian law is concerned, it appears to provide for the remedy of specific performance pursuant to Article 1505 of the Civil Code.

71. Accordingly, at first sight at least, a right to specific performance appears to exist. Some other factual and legal elements seem to support the possibility of specific performance: (i) Burlington Oriente's claim for specific performance is a contract, not a treaty claim; (ii) the PSCs are still being performed, and (iii) they contain a choice of Ecuadorian law and a tax stabilization clause. Thus, at least *prima facie*, a right to specific performance could exist in the present situation. Under the circumstances, the same can be said of the right to the protection of the effectivity of a possible future award.

¹¹ See also e.g. *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para.400: "Restitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation."

D. URGENCY

72. The Parties agree that there is urgency when it is impossible to wait until the award because actions prejudicial to the rights of the petitioner are likely to be taken before the Arbitral Tribunal decides on the merits of the dispute. They disagree, however, on whether the present facts meet the urgency requirement. The Respondents in particular submit that the threat of termination of the PSCs does not create an urgent situation as Ecuador has confirmed to the Tribunal on 23 February 2009 that the Respondents had taken no steps to this effect.
73. The Arbitral Tribunal agrees that the criterion of urgency is satisfied when, as Schreuer puts it, "*a question cannot await the outcome of the award on the merits*"¹². This is in line with ICJ practice¹³. The same definition has also been given in *Biwater Gauff v. Tanzania*:

"In the Arbitral Tribunal's view, the degree of 'urgency' which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award."¹⁴

74. The Tribunal shares the Respondents' opinion that no urgency arises from the alleged threat of termination of the PSCs. The urgency lies elsewhere and is closely linked to the non-aggravation of the dispute discussed in the preceding section, to which the Tribunal refers. Indeed, when the

¹² Christoph SCHREUER, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, p. 751 (para.17).

¹³ In the words of the ICJ, "[w]hereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 17, para.23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, ICJ Reports 2003, p. 107, para.22 ; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Preliminary Objections, Order of 23 January 2007, p. 11, para.32), and whereas the Court thus has to consider whether in the current proceedings such urgency exists", Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Order of 15 October 2008, para.129.

¹⁴ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1 of 31 March 2006, para.76.

measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition¹⁵.

E. NECESSITY OR NEED TO AVOID HARM

75. The Parties concur that the measures must be necessary or in other words that they must be required to avoid harm or prejudice being inflicted upon the applicant. They differ, however, on the required intensity of the harm: “*irreparable*”, *i.e.* not compensable by money, for the Respondents, as opposed to “*significant*” for the Claimant.
76. The Respondents substantially argue that the harm invoked by Burlington Oriente cannot be deemed “*irreparable*” because (i) no production assets were seized and (ii) such harm can easily be made good by a monetary award. They rely in particular on *Occidental Petroleum and other v. Ecuador* to argue that “*a mere increase in damages is not a justification for provisional measures*” (Rejoinder, para.55).
77. The Claimant does not dispute that no production assets were seized, but insists that its operational capacity is severely threatened by the seizures, that the imposition of the Law 42 payments led to a loss on investment in 2008 and prevented a sale of the latter (Testimony of Mr. Martinez, Transcript, pp.117-118 and 114). It also argues that it may have no other choice than to “walk away” from its investment.
78. The words “necessity” or “harm” do not appear in the relevant ICSID provisions. Necessity is nonetheless an indispensable requirement for provisional measures. It is generally assessed by balancing the degree of harm the applicant would suffer but for the measure.
79. The Respondents are right in pointing out that a number of investment tribunals have required irreparable harm in the sense of harm not compensable by monetary damages. The *Occidental* tribunal found that there was no irreparable harm since the Claimants’ harm, if any, could be

¹⁵ Of the same opinion, in particular, City Oriente, Decision on Provisional Measures, para.69.

compensated by a monetary award¹⁶. In the same vein, the *Plama* tribunal mentioned that it accepted the respondent's argument that the harm was not irreparable if it could be compensated by damages¹⁷, but did not discuss the matter further. Similarly, the tribunal in *Metalclad v. Mexico* denied the request and underlined that the measures must be required to protect the applicant's rights from "*an injury that cannot be made good by subsequent payment of damages*"¹⁸.

80. By contrast, the *City Oriente* tribunal distinguished its case from investment cases where the sole relief sought was damages, while *City Oriente* was seeking contract performance¹⁹. In its decision not to revoke the measures, the tribunal stressed that neither Article 47 of the ICSID Convention nor Arbitration Rule 39 "*require that provisional measures be ordered only as means to prevent irreparable harm*"²⁰. In the UNCITRAL investment case of *Paushok v. Mongolia*, the tribunal distinguished *Plama*, *Occidental* and *City Oriente* and concluded that "*irreparable harm*" in international law has a "*flexible meaning*". It also referred to Article 17A of the UNCITRAL Model Law which only requires that "*harm not adequately reparable by an award of damages is likely to result if the measures are not ordered*"²¹.

81. However defined, the harm to be considered does not only concern the applicant. The *Occidental* tribunal recalled that the risk of harm must be assessed with respect to the rights of both parties. Specifically, it stated that "*provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State*".²² In the same spirit, the *City Oriente* tribunal stressed the need to weigh the interests at stake against each other. Referring to

¹⁶ *Occidental*, para.92.

¹⁷ *Plama*, para.46.

¹⁸ *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Decision on a request by the Respondent for an order prohibiting the Claimant from revealing information regarding ICSID Case ARB(AF)/97/1, para.8.

¹⁹ *City Oriente*, Decision on Revocation, para.86.

²⁰ *Ibid.*, para.70.

²¹ *Paushok*, paras.62, 68-69.

²² *Occidental*, para.93.

Article 17A(1) of the UNCITRAL Model Law, it emphasized the balance of interests that needs to be struck as follows:

“It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceeds greatly the damage caused to the party affected thereby.”²³

82. In the circumstances of the present case, this Tribunal finds it appropriate to follow those cases that adopt the standard of “*harm not adequately reparable by an award of damages*” to use the words of the UNCITRAL Model Law. It will also weigh the interests of both sides in assessing necessity.
83. Unlike *Occidental*, this case is not one of only “*more damages*” caused by the passage of time²⁴. It is a case of avoidance of a different damage. The risk here is the destruction of an ongoing investment and of its revenue-producing potential which benefits both the investor and the State. Indeed, if the investor must continue to finance operation expenses while making losses, from a business point of view it is likely that it will reduce its investment and maintenance costs to a minimum and thus its output and the shared revenues. There is also an obvious economic risk that it will cease operating altogether. While profit sharing may be legitimate, expecting that a foreign investor will continue to operate a loss making investment over years is unreasonable as a matter of practice. Contrary to the Respondents’ assertion pursuant to which the protection would be granted against the investor’s own act of “walking away”, the Tribunal considers that the project and its economic standing is at risk regardless of the conduct of the investor.
84. In reaching this conclusion, the Tribunal has paid due attention to the Respondents’ argument that the effect of the seizures was economically neutral for the Claimant. Every time oil is seized for a given amount, past due Law 42 debts are extinguished, which would allow the Claimant to withdraw the equivalent amount from the segregated account. Although

²³ City Oriente, Decision on Revocation, para.72.

²⁴ Occidental, para.99.

the Claimant replies that it will not touch the monies on the segregated account, the objection is mathematically speaking correct. Yet, it misses the point. Indeed, the risk of further deterioration of the relationship possibly ending with the destruction of the investment would still exist. This is especially, but not exclusively so if the investor is liable to settle both the alleged past due Law 42 payments and the newly accruing ones (Transcript, p.195). The consequences of the end of the investment relationship would affect the investor as well as the State. The latter would then in effect lose future Law 42 payments if they are ultimately held to be due.

85. This last observation shows that provisional measures are in the interest of both sides if they are adequately structured, a matter discussed in the next section.

F. ESCROW ACCOUNT

86. As an alternative to its main request for relief, Burlington Oriente confirmed at the hearing that it could envisage an escrow account "*where all the funds that are the subject of this dispute could be held pending its resolution*" (Transcript, pp.23-24, esp. lines 16-18). The Arbitral Tribunal notes the Respondents' argument that such account would be "*unmanageable and inadequate*" (Transcript, p.211, line 12), since it would exclusively cover the Parties in this arbitration, notwithstanding the joint liability of the Consortium and also because an offshore escrow account would be "*inimical to Ecuador's sovereignty*" (Transcript, p.212, lines 4-5).
87. The Arbitral Tribunal is of the view that the establishment of an escrow account would provide a balanced solution likely to preserve each Party's rights. The Republic of Ecuador would have the certainty that the amounts allegedly owing would be paid and could later be collected if held to be due. The investor would benefit from the cessation of the *coactiva* process, and although paying significant amounts into the escrow account, would have the assurance that such amounts could later be recovered if held not to be due. Moreover, in reliance on such assurances, one would

reasonably expect both Parties to continue the performance of the PSCs under their terms.

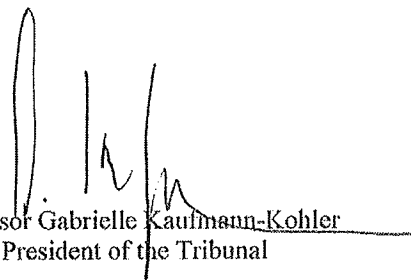
88. The terms and conditions of the escrow account, and other practicalities call for a number of specifications:
- (i) The escrow account shall contain all future and past payments due under Law 42 and Decree 662. Past payments shall include all payments owed by the Claimant and payed into their segregated account. It appears that past payments (in the amount of USD 327.4 million) were made by the Consortium into two segregated U.S. accounts (one for each of the members of the Consortium, see Request, para.25). Therefore, even if the Consortium were jointly liable for its debts as the Respondents allege, the Claimant will be able to separate the payments owed by it from the payments owed by Perenco.
 - (ii) The amounts deposited on the escrow account shall only be released in accordance with a final award, or a settlement agreement duly entered into by the Parties, or with other specific instructions issued by this Tribunal.
 - (iii) The escrow agent shall be an internationally recognized financial institution. For reasons of neutrality, it shall not be an Ecuadorian, North American or Bermuda institution.
 - (iv) Interest earned on the escrow account should be credited to such account and released in accordance with a final award, or a settlement agreement, or other instructions from this Tribunal.
 - (v) The costs incurred by the escrow account shall be borne equally by both Parties but can be made part of the claim for compensation by each Party.

IV. ORDER

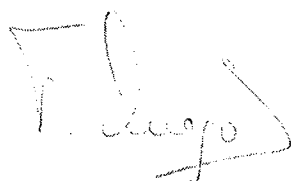
[89] On this basis, the Arbitral Tribunal makes the following order:

1. The Parties shall confer and make their best efforts to agree on the opening of an escrow account at an internationally recognized financial institution incorporated outside of Ecuador, the United States of America and Bermuda;

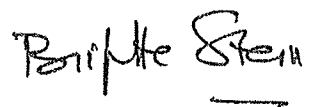
2. Burlington Oriente shall pay into the escrow account all future and past payments allegedly due under Law 42 and Decree 662, including all payments made by the Claimants into their segregated account;
3. The funds in the escrow account shall only be released in accordance with a final award or a settlement agreement duly entered into by the Parties or with other specific instructions from this Tribunal;
4. The costs of the escrow account shall be borne equally by both Parties and can be made part of the claim for compensation by each Party;
5. The interest accrued on the escrow account shall be credited to such account and released in accordance with a final award, or a settlement agreement, or other instructions from this Tribunal;
6. If the Parties cannot agree on the opening of an escrow account within 60 days from notification of this Order, they shall report to the Arbitral Tribunal setting forth the status of their negotiations and the content of and reasons for their disagreements after which the Arbitral Tribunal will rule on the outstanding issues;
7. The Respondents shall discontinue the proceedings pending against the Claimant under the *coactiva* process and shall not initiate new *coactiva* actions;
8. The Parties shall refrain from any conduct that may lead to an aggravation of the dispute until the Award or the reconsideration of this order. In particular, Burlington Oriente shall refrain from making good on its threat to abandon the project and Ecuador shall refrain from any action that may induce Burlington Oriente to do so;
9. The Order issued by this Tribunal on 6 March 2009 is terminated;
10. Costs are reserved for a later decision or award.



Professor Gabrielle Kaufmann-Kohler
President of the Tribunal



Professor Francisco Orrego Vicuña
Arbitrator



Professor Brigitte Stern
Arbitrator

Chapter 17: Provisional Relief in International Arbitration

Gary B. Born


Author


► Gary B. Born

Source

► **Chapter 17: Provisional Relief in International Arbitration** in Gary B. Born, *International Commercial Arbitration*, Second Edition (© Kluwer Law International, Kluwer Law International 2014), pp. 2424–2563

[Chapter 17]⁽¹⁾

 [page "2424"](#) This Chapter addresses the subject of provisional or interim measures of protection and conservation ("provisional measures"), designed to protect parties or property during the pendency of international arbitration proceedings. The Chapter first discusses the extent to which international arbitrators are authorized to grant provisional relief and the circumstances in which they will be willing to do so. Second, the Chapter addresses the enforceability of international courts of provisional measures ordered by international arbitrators. Finally, the Chapter considers when national courts may grant provisional relief in aid of an international arbitration, whether concurrently with arbitrators or independently.


 [page "2425"](#) § 17.01. INTRODUCTION

Contemporary litigation and arbitration in most legal systems is accompanied by procedural safeguards and opportunities for a party to be heard. One inevitable consequence of these procedural protections is delay in the ultimate resolution of the parties' dispute; in turn, this delay can prejudice one party, sometimes irreparably. Classic examples include dissipation of assets, destruction of evidence, loss of market value of property, disruption of a joint venture's operations, destruction of an ongoing business, disclosure or misuse of intellectual property and interference with customer relations. These sorts of damage can be exacerbated where one party seeks deliberately to take advantage of or create delays in the dispute resolution process, in order to improve its overall tactical position or exert pressure on its adversary.

Given the foregoing, national legislatures and courts have developed means for granting interlocutory or interim provisional measures designed to safeguard parties from serious injury caused by delays in the litigation process. These provisional measures rest on a simple premise: in order for a dispute resolution process to function in a fair and effective manner, it is essential that arbitrators possess broad power to safeguard the parties' rights and their own remedial authority during the pendency of the dispute resolution proceedings. Unless the arbitrators are able to grant provisional measures, their ability to provide effective final relief may be frustrated, one party may suffer grave damage, or the parties' dispute may be unnecessarily exacerbated during the pendency of the dispute resolution process. As explained in the General Advocate's opinion for the European Court of Justice:

"Interim protection has precisely that objective purpose, namely to ensure that the time needed to establish the existence of the right does not in the end have the effect of remedially depriving the right of substance, by eliminating any possibility of exercising it; in brief, the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection."⁽²⁾

Provisional measures have particular importance in international disputes.⁽³⁾ Cases involving litigants from different nations pose special risks, including the increased danger that vital evidence will be taken out of the reach of relevant arbitrators or that assets necessary to satisfy a judgment will be removed to a jurisdiction where enforcement is unkey.

 [page "2426"](#) As discussed below, historically there were significant limitations, or prohibitions against, the power of arbitrators to order provisional relief, while arbitrators were reluctant to exercise those powers that they did possess.⁽⁴⁾ More recently, as so discussed below, national law has removed many of the historical limitations on the powers of arbitrators to grant provisional measures of protection, while arbitrators have demonstrated increased willingness to make use of such powers.⁽⁵⁾ These developments have made provisional measures much more important in contemporary international arbitration, both as a means of protecting parties'

should not as a technical matter prejudice or predetermine the final award.⁽²⁸⁶⁾ Even in cases where a tribunal considers the likelihood that the claimant's case will succeed,⁽²⁸⁷⁾ that consideration is only preliminary and in no way a final determination on the merits; it in no way constitutes *res judicata* in the final award and, properly applied, should in no way prejudice the merits.

As to the argument that provisional measures should not grant the relief sought in the final award,⁽²⁸⁸⁾ this too is overstated. There may well be cases where the requested provisional measures seek – on a provisional basis during the pendency of the arbitration – precisely the same relief requested in the final award (e.g., continuation of a long-term contract, notwithstanding a purported termination; preservation of ownership/control rights in property). Whether termed “preservation of the status quo” or otherwise, this sort of relief can well grant one party, on a provisional basis during the pendency of the arbitration, almost exactly what it seeks in the final award. This should not, however, prevent the granting of provisional measures.

Properly analyzed, the “no prejudgment” requirement stands for the fairly basic, but nonetheless important, propositions that (a) a grant of provisional measures may not [page "2477"](#) preclude the tribunal from ultimately deciding the arbitration in any particular manner after the parties have presented their cases (e.g., provisional measures should not make it more difficult for the tribunal to render a decision in favor of one party or the other); (b) provisional measures have no *res judicata* or similar preclusive effect with regard to a decision on the merits; (c) a tribunal must take care to ensure that it does not, in considering and deciding an application for provisional measures, prejudice the outcome of the arbitration or even partially close its mind to one party's submissions or deny one party an opportunity to be heard in subsequent proceedings; and (d) the same relief that is sought as final relief may ordinarily be issued on a provisional basis, subject to later revision (although that relief might in some cases also be issued as partial final relief prior to a final award).⁽²⁸⁹⁾

As noted above, the “no prejudgment” requirement does *not* mean that a tribunal may not consider and decide upon the likely prospects of a claim (e.g., whether the claimant has presented a *prima facie* case or which party preliminarily appears more likely to prevail). Rather, a tribunal is entirely free to take such matters into account, provided that the arbitrators do not in any way close their minds to the parties' subsequent submissions nor accord the provisional measures decision any preclusive effect.

[iv] . Prima Facie Case or Probability of Success on Merits

Fourth, some tribunals and commentators have held that the party requesting provisional measures must demonstrate a *prima facie* case on the merits of its claim (or, in other formulations, a probability of prevailing on its claim).⁽²⁹⁰⁾ As formulated by one award:

“The present Arbitral Tribunal is not a referee jurisdiction, but a jurisdiction of the merits seized of provisional measures....The powers of the merits ruling provisionally are not limited like those of the referee judge and a serious dispute does not prevent a

broader appreciation, although on a provisional basis, of the respective arguments of the parties.”⁽²⁹¹⁾

page "2478" At the same time, other awards and commentators have refused to consider whether one party (or both parties) have stated a *prima facie* case,⁽²⁹²⁾ sometimes saying that this conflicts with the requirement that provisional measures not prejudice the merits of the tribunal's final award.⁽²⁹³⁾ According to one such authority, “if a tribunal cannot grant an interim or conservatory measure without examining the merits of the case, it may refrain from doing so, in order not to prejudice on the merits.”⁽²⁹⁴⁾

The better view is to the contrary, providing that an arbitral tribunal should consider the *prima facie* strength of the parties' respective claims and defenses in deciding whether to grant provisional measures. As already discussed, an assessment of the existence of a *prima facie* case does not prejudice the merits of the case: it is a purely provisional assessment based upon incomplete submissions and evidence, without preclusive effects.⁽²⁹⁵⁾

At the same time, it is essential for a tribunal to assess the existence of a *prima facie* case in order to make rational and commercially-sensible decisions regarding provisional measures. For example, if a claimant licensee has failed to present a *prima facie* case of wrongful termination of a license agreement, while the respondent licensor has presented a comprehensive defense as to why it was contractually entitled to terminate, then a tribunal should be quite hesitant to order the respondent licensor to continue to permit use of licensed property and to supply updates and similar assistance on a provisional basis during the pendency of the arbitration.

In such circumstances it would only be a rare case, involving very strong showings of an urgent risk of grave and irreparable damage to the claimant, that provisional measures should be ordered. Conversely, if the claimant licensee has advanced a very thorough case as to wrongful termination, countered by no serious argument or page "2479" evidence from the respondent licensor, provisional measures should be much more readily granted.

In both the foregoing cases, the tribunal's decision on provisional measures may quite properly consider the legal sufficiency and strength of the parties' respective cases. This is the approach to provisional measures in domestic judicial proceedings in many developed legal systems.⁽²⁹⁶⁾ It is also a commercially-sensible basis for issuing provisional measures. It makes very little sense to “protect” one party, by requiring the adverse party to continue providing goods, services, or licensed property during the pendency of the arbitration, if there appears to be little prospect that the “protected” party will prevail in a final award: in fact, a grant of provisional measures in these circumstances does not amount to “protection,” but rather an unjustified windfall that damages an innocent party.

Furthermore, in cases where a party seeking provisional measures has made a credible, but no stronger, case of serious harm, during the course of the arbitral proceedings, then consideration of the merits of the case appears both appropriate and sensible. In such circumstances, the real issue is how interim damage arising during the arbitral proceedings (and the risks of such damage) should be allocated pending a final decision in the arbitration that will

determine the parties' rights. This allocation of interim damage is necessary precisely because the tribunal's final determination is not yet known; if the final determination were known, then the proper allocation of interim damage could be made.

Given this, it is entirely appropriate for a tribunal to consider – recognizing that it is not making a decision, but instead a preliminary assessment based on partial submissions – the possible outcomes of a final award.⁽²⁹⁷⁾ Indeed, it would in many respects be both irrational and unjust not to do so: it would result in parties that have conducted themselves entirely appropriately, and that have thoroughly rebutted implausible, defective and/or unsupported claims, being required to act, prior to any arbitral award, as if they had no defense to claims against them.

It bears emphasis, however, that an inquiry into the merits of the parties' claims and defenses is solely on a *prima facie* basis, without any detailed or binding assessment of the evidence or the merits of the parties' legal arguments. At the stage of a request for provisional measures, parties frequently have not submitted their complete (or, often, even partial) cases, either evidentiary or legal. It would be premature and inappropriate for a tribunal to attempt to make binding or comprehensive [page "2480"](#) assessments of the relative merits of the parties' claims and defenses at this stage of the proceedings.

Consistent with this, all authorities that permit consideration of the merits of the parties' claims in connection with a request for provisional measures emphasize that this is a very limited and *prima facie* inquiry. "[I]t is at the merits that one sees 'whether there really has been a breach,'"⁽²⁹⁸⁾ and not at the stage of a request for provisional measures.⁽²⁹⁹⁾ Indeed, only in rare cases, where a claimant has failed to advance any plausible basis for its claims will tribunals deny provisional relief based on a *prima facie* view of the merits.

[v] . Prima Facie Jurisdiction

It is also sometimes said that a showing of the tribunal's jurisdiction, at least on a *prima facie* basis, is a requirement for provisional measures.⁽³⁰⁰⁾ In the words of one tribunal, "[w]hile the Tribunal need not satisfy itself that it has jurisdiction to determine the merits of this case for the purposes of ruling on the application for provisional measures, it will not order such measures unless there is at least a *prima facie* basis upon which such jurisdiction might be established."⁽³⁰¹⁾

Statements regarding *prima facie* jurisdiction requirements require elaboration. In fact, a tribunal is able to issue provisional measures notwithstanding the existence of a jurisdictional challenge and notwithstanding the fact that the tribunal has not ruled [page "2481"](#) on this challenge.⁽³⁰²⁾ Simply put, the fact that the tribunal may ultimately lack jurisdiction over the underlying dispute does not prevent it from properly issuing provisional measures.

Thus, arbitral tribunals have not infrequently ordered provisional relief notwithstanding the existence of an unresolved, and therefore possibly well-founded, jurisdictional challenge. One commentary cited "the well-settled position in international adjudication...that an international tribunal may decide on provisional measures prior to

establishing its jurisdiction over the dispute if it appears that there is, *prima facie*, a basis for asserting such jurisdiction.”⁽³⁰³⁾

A number of arbitral awards have considered whether there is a *prima facie* jurisdictional basis before ordering provisional measures.⁽³⁰⁴⁾ Tribunals have generally declined to grant such relief in the absence of a *prima facie* showing of jurisdiction, with a representative award refusing to issue provisional measures because “the Tribunal is not at present satisfied that it appears, *prima facie*, that there exists a basis on which it can exercise jurisdiction.”⁽³⁰⁵⁾

Commentary is to the same effect,⁽³⁰⁶⁾ as are decisions by the ICJ and other international courts. As the ICJ has concluded:

“On a request for provisional measures, the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless *page* ["2482"](#) the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded.”⁽³⁰⁷⁾

Importantly, the jurisdictional analysis in a request for provisional measures is limited to a *prima facie* inquiry.⁽³⁰⁸⁾ The arbitral tribunal does not make a final jurisdictional ruling, but instead considers only whether there is a *prima facie* or reasonable argument that jurisdiction exists. The point is that if there is little or no chance that a tribunal will have jurisdiction, it would serve little purpose, and be inequitable, for it to grant provisional measures. However, given the urgency associated with the need for provisional measures, a tribunal should not delay a provisional measures decision by undertaking a full jurisdictional analysis which, by definition, cannot occur on a time scale consistent with appropriately dealing with a request for interim relief.

Of course, if a tribunal subsequently concludes that a jurisdictional challenge is well-grounded, then it will lack any authority to maintain its previous provisional measures. Until such a determination, however, the tribunal’s provisional measures are entitled to the same force as its directions regarding conduct of the arbitration.

[4]. Categories of Provisional Measures

In practice, a wide variety of different types of provisional measures are commonly encountered in international arbitration. For the most part, and as detailed below, developed legal systems and institutional rules provide for the same general categories of provisional measures.⁽³⁰⁹⁾

In principle, the forms of provisional relief available in international arbitration are very broad, constrained only by the requirements that provisional measures be *page* ["2483"](#) directed towards parties to the arbitration (not nonparties)⁽³¹⁰⁾ and not exceed any mandatory limits in applicable national law⁽³¹¹⁾ or the parties’ arbitration agreement.⁽³¹²⁾ Subject to these limits, the types of provisional relief that may be granted by an international arbitral tribunal generally

Contact Information Redacted

From: Jeffrey LeVee
Sent: Wednesday, October 29, 2014 4:48 PM
To: Ali, Arif; Carolina Cardenas-Venino, LL.M.
Cc: Yates, Erin; Craven, Meredith; Rachel Zernik
Subject: RE: Dot Registry, LLC v. ICANN, ICDR Case No. 01-14-0001-5004

All:

I have previously advised Mr. Ali and the ICDR that ICANN views Article 37 of the ICDR rules to be in effect for this proceeding because a standing panel for all IRPs has not yet been appointed. I wanted to follow up further in that respect.

Dot Registry has chosen to initiate this Independent Review Proceeding (IRP) relating to its application(s) for .LLC, .INC and .LLP. If Dot Registry believes that ICANN's processing of any related applications should be placed on hold during the pendency of this IRP, ICANN has determined that Dot Registry must seek emergency relief pursuant to the rules provided in the International Centre for Dispute Resolution, International Rules for Arbitration. The applicable rule from the ICDR rules that became effective on June 1, 2014 (which pre-dates the filing of this IRP) in fact is Article 6. Absent a recommendation for a stay, and ICANN's determination to follow that recommendation, ICANN will continue to process all related applications, including Claimants' applications.

Please let me know if you have any questions.

Jeff LeVee
JONES DAY® - One Firm Worldwide
Contact Information Redacted

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From: Jeffrey LeVee Contact Information Redacted
Sent: Friday, October 17, 2014 11:51 AM
To: Yates, Erin
Cc: Ali, Arif; Carolina Cardenas-Venino, LL.M.; Craven, Meredith; Rachel Zernik
Subject: RE: Dot Registry, LLC v. ICANN, ICDR Case No. 01-14-0001-5004
Attachments: pic22483.jpg; Weil Comments on ICANN_s IRP Panel Selection Proposal_WEIL_95121911_3.DOCX

ICANN accepts this proposal for selecting the Panel.

Jeff LeVee
 JONES DAY® - One Firm Worldwide
 Contact Information Redacted

Contact Information Redacted

From: "Yates, Erin" Contact Information Redacted
To: "Carolina Cardenas-Venino, LL.M." Jeffrey LeVeeContact Information Redacted
Cc: "Ali, Arif" Contact Information "Craven, Meredith"Contact Information Redacted
Date: 10/16/2014 11:40 AM
Subject: RE: Dot Registry, LLC v. ICANN, ICDR Case No. 01-14-0001-5004

Dear Carolina and Jeff,
 We have a few comments on the proposal circulated by Mr. LeVee last week, which we've incorporated in the attached version of the proposal. If the attached version is acceptable to ICANN, then we have an agreement on the procedure for selecting the arbitrators.
 Best regards,
 Erin

From: Carolina Cardenas-Venino, LLContact Information Redacted
Sent: Wednesday, October 15, 2014 12:07 PM
To: Yates, Erin; Jeffrey LeVee
Cc: Ali, Arif; Craven, Meredith
Subject: RE: Dot Registry, LLC v. ICANN, ICDR Case No. 01-14-0001-5004

Dear Mr. Levee,

Can we please have your comments regarding the below?

In addition, what is claimant's position as to ICANN's proposal for the appointment of the Panelists, attached herein?

Thank you for your kind attention to this matter.

Regards
Carolina

cid:image002.png@01CFE94E.CBD1F810 Carolina Cardenas-Venino, LL.M.

International Senior Case Counsel
American Arbitration Association
International Centre for Dispute Resolution
Contact Information
Redacted

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From: Yates, Erin
Sent: Thursday, October 09, 2014 9:20 PM
To: Carolina Cardenas-Venino, LL.M.; Jeffrey LeVee
Cc: Ali, Arif; Craven, Meredith
Subject: Dot Registry, LLC v. ICANN, ICDR Case No. 01-14-0001-5004

Dear Carolina,

We are writing in response to your request that the parties respond by October 9, 2014, regarding the location of any in-person hearings that may need to be scheduled in the future. At this time, we are not prepared to agree that the venue for this proceeding will be Los Angeles, CA.

Consistent with Dot Registry's Notice of IRP, filed with the ICDR on September 21, 2014, we request that any proceedings be held in Washington, D.C. We propose, however, that the parties postpone deciding on the location at this time, as we are confident that the parties will be able to reach an agreement at a later date based upon the convenience of the parties, witnesses and arbitrators.

Regards,
Erin

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cid:image001.jpg@01CFE3AF.7AC9C820

Erin K. Yates

Weil, Gotshal & Manges LLP
Contact Information Redacted

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(See attached file: Weil Comments on ICANN_s IRP Panel Selection Proposal_WEIL_95121911_3.DOCX)

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Dot Registry and ICANN – IRP Panel Selection Proposal

This IRP shall be finally decided by a three-member panel, composed of one panelist selected by each party and a presiding panelist selected by the two party-appointed panelists, with the two party-appointed panelists expressly authorized to consult the respective parties which nominated them or, in the event the two party-appointed panelists are unable to reach an agreement, selected by the parties from a list of five potential presiding panelists chosen by the two party-appointed panelists.¹ The two party-appointed panelists (but not the parties) shall contact potential presiding panelists to determine availability, interest and the absence of any conflicts. Thereafter, the following procedure shall apply:

- Each party will rank the proposed presiding panelists in order of preference, from one (highest preference) to five (lowest preference). The rankings shall be sent simultaneously to the ICDR Case Manager by each party, and once the ICDR Case Manager has confirmed receipt of the rankings from both Parties, the ICDR Case Manager shall disclose the rankings to the parties.
- The rankings shall remain completely confidential, with no disclosure of the parties' respective rankings to the IRP Panel or to any other person other than the ICDR Case Manager, the parties and their counsel;
- The candidate with the lowest combined score will be jointly nominated by the parties as the presiding panelist;
- In the event that the first panelist is not able to serve as the presiding panelist, the parties will nominate the panelist with the next-lowest score;
- In the event that the second panelist is not able to serve as the presiding panelist, the parties will nominate the panelist with the next-lowest score;
- In the event of a tie or another situation preventing the nomination of a presiding panelist, the parties will have a 15-day period in which to jointly nominate a panelist, with each party expressly authorized to consult the respective party-appointed panelist it initially nominated; and
- If this procedure does not result in the appointment of a presiding panelist after the expiry of the 15-day period, any of the parties may ask the ICDR to make the appointment, in which case, none of the candidates who were put forward in this procedure will be eligible to be appointed by the ICDR.

¹ Claimant shall nominate its panelist by October 31, 2014. ICANN shall nominate its panelist within twenty days after the date on which Claimant nominates its panelist.

LAI-383224562v1



Basic documents

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

TABLE OF CONTENTS:

Chapter I: Organization of the Court (Articles 2 - 11)

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Chapter V: Amendment (Articles 69 & 70)

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 jurists 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.

C-ER-43



**UNIVERSAL
DECLARATION
OF HUMAN
RIGHTS**

*Dignity and justice
for all of us*



UNITED NATIONS

*60th Anniversary
Special Edition*

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**UNIVERSAL
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RIGHTS**

*60th Anniversary
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1948-2008



United Nations



Foreword

On 10 December 1948, the Universal Declaration of Human Rights was proclaimed and adopted by the General Assembly. The extraordinary vision and determination of the drafters produced a document that for the first time set out universal human rights for all people in an individual context. Now available in more than 360 languages, the Declaration is the most translated document in the world — a testament to its universal nature and reach. It has inspired the constitutions of many newly independent States and many new democracies. It has become a yardstick by which we measure respect for what we know, or should know, as right and wrong.

It is our duty to ensure that these rights are a living reality — that they are known, understood and enjoyed by everyone, everywhere. It is often those who most need



their human rights protected who also need to be informed that the Declaration exists — and that it exists for them.

The sixtieth anniversary of the adoption of the Declaration is an occasion for all of us to recommit to the vision of the Declaration. It remains as relevant today as it was on the day it was adopted. I hope you will make it part of your life.

A handwritten signature in black ink, reading "Ban Ki-moon", is centered on the page.

Ban Ki-moon
Secretary-General



Introduction

It is difficult to imagine today just what a fundamental shift the Universal Declaration of Human Rights represented when it was adopted 60 years ago. In a post-war world scarred by the Holocaust, divided by colonialism and wracked by inequality, a charter setting out the first global and solemn commitment to the inherent dignity and equality of all human beings, regardless of colour, creed or origin, was a bold and daring undertaking, one that was not certain to succeed. The fact that it has led to an extensive infrastructure of protection of all the fundamental freedoms we are all entitled to is a tribute to the vision of the drafters of the Declaration and to the many human rights defenders who have struggled over the last six decades to make that vision a reality. This struggle is far from over, and therein lies the power of the Declaration: it is a living



document that will continue to inspire generations to come.

A handwritten signature in black ink, which appears to read 'Louise Arbour', is centered on the page.

Louise Arbour
High Commissioner
for Human Rights



All human beings
are born with equal and inalienable rights
and fundamental freedoms.

The United Nations is committed to
upholding, promoting and protecting
the human rights of every individual.
This commitment stems from the United Nations
Charter, which reaffirms the faith of the peoples
of the world in fundamental human rights and
in the dignity and worth of the human person.

*In the Universal Declaration
of Human Rights,*
the United Nations has stated
in clear and simple terms the rights
which belong equally to every person.

These rights belong to you.

They are your rights.
Familiarize yourself with them.
Help to promote and defend them for yourself as
well as for your fellow human beings.



C-ER-43

Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women



and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly

proclaims

this Universal Declaration of Human Rights

as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.



Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

*Article 5*

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial



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tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

(1) Everyone has the right to freedom of movement and residence within the borders of each State.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

*Article 14*

- (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
- (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

- (1) Everyone has the right to a nationality.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.



Article 17

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.



Article 21

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right to equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.



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(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

*Article 26*

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.



Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

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UNCITRAL Arbitration Rules

(as revised in 2010)



Further information may be obtained from
UNCITRAL secretariat, Vienna International Centre
Contact Information
Redacted

UNCITRAL Arbitration Rules

(as revised in 2010)



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Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/65/465)]

65/22. UNCITRAL Arbitration Rules as revised in 2010

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Also recalling its resolution 31/98 of 15 December 1976 recommending the use of the Arbitration Rules of the United Nations Commission on International Trade Law,¹

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international commercial relations,

Noting that the Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions, in all parts of the world,

Recognizing the need for revising the Arbitration Rules to conform to current practices in international trade and to meet changes that have taken place over the last thirty years in arbitral practice,

Believing that the Arbitration Rules as revised in 2010 to reflect current practices will significantly enhance the efficiency of arbitration under the Rules,

Convinced that the revision of the Arbitration Rules in a manner that is acceptable to countries with different legal,

¹ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), chap. V, sect. C.*

social and economic systems can significantly contribute to the development of harmonious international economic relations and to the continuous strengthening of the rule of law,

Noting that the preparation of the Arbitration Rules as revised in 2010 was the subject of due deliberation and extensive consultations with Governments and interested circles and that the revised text can be expected to contribute significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of international commercial disputes,

Also noting that the Arbitration Rules as revised in 2010 were adopted by the United Nations Commission on International Trade Law at its forty-third session after due deliberation,²

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having formulated and adopted the revised provisions of the Arbitration Rules, the text of which is contained in an annex to the report of the United Nations Commission on International Trade Law on the work of its forty-third session;³

2. *Recommends* the use of the Arbitration Rules as revised in 2010 in the settlement of disputes arising in the context of international commercial relations;

3. *Requests* the Secretary-General to make all efforts to ensure that the Arbitration Rules as revised in 2010 become generally known and available.

*57th plenary meeting
6 December 2010*

² *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, chap. III.

³ *Ibid.*, annex I.

UNCITRAL Arbitration Rules

(as revised in 2010)

Section I. Introductory rules

*Scope of application**

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

2. The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.

3. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Notice and calculation of periods of time

Article 2

1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.

2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall

*A model arbitration clause for contracts can be found in the annex to the Rules.

be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.

3. In the absence of such designation or authorization, a notice is:

- (a) Received if it is physically delivered to the addressee; or
- (b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.

5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Notice of arbitration

Article 3

1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall communicate to the other party or parties (hereinafter called the "respondent") a notice of arbitration.

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

3. The notice of arbitration shall include the following:
 - (a) A demand that the dispute be referred to arbitration;
 - (b) The names and contact details of the parties;
 - (c) Identification of the arbitration agreement that is invoked;
 - (d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;
 - (e) A brief description of the claim and an indication of the amount involved, if any;
 - (f) The relief or remedy sought;
 - (g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:
 - (a) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;
 - (b) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;
 - (c) Notification of the appointment of an arbitrator referred to in article 9 or 10.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Response to the notice of arbitration

Article 4

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:
 - (a) The name and contact details of each respondent;
 - (b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g).

2. The response to the notice of arbitration may also include:
 - (a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;

- (b) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;
- (c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;
- (d) Notification of the appointment of an arbitrator referred to in article 9 or 10;
- (e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought;
- (f) A notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

3. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Representation and assistance

Article 5

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

Designating and appointing authorities

Article 6

1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance

with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. Where these Rules provide for a period of time within which a party must refer a matter to an appointing authority and no appointing authority has been agreed on or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.

4. Except as referred to in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority.

5. In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and they shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority and the Secretary-General of the PCA shall also be provided by the sender to all other parties.

6. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

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

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 7

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.
2. Notwithstanding paragraph 1, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.

Appointment of arbitrators (articles 8 to 10)

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.
2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:
 - (a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;
 - (b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects

and numbered the remaining names on the list in the order of its preference;

- (c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;
- (d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.
2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.
3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

Article 10

1. For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.
2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.
3. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so,

may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

Disclosures by and challenge of arbitrators**
(articles 11 to 13)

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.
3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

**Model statements of independence pursuant to article 11 can be found in the annex to the Rules.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.
3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.
4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

Replacement of an arbitrator

Article 14

1. Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.
2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; or (b) after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Repetition of hearings in the event of the replacement of an arbitrator

Article 15

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Exclusion of liability

Article 16

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

Section III. Arbitral proceedings

General provisions

Article 17

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

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

4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Place of arbitration

Article 18

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.
2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

Language

Article 19

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.
2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statement of claim

Article 20

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.

2. The statement of claim shall include the following particulars:
 - (a) The names and contact details of the parties;
 - (b) A statement of the facts supporting the claim;
 - (c) The points at issue;
 - (d) The relief or remedy sought;
 - (e) The legal grounds or arguments supporting the claim.
3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.
4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Statement of defence

Article 21

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration referred to in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.
2. The statement of defence shall reply to the particulars (b) to (e) of the statement of claim (art. 20, para. 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.
3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.
4. The provisions of article 20, paragraphs 2 to 4, shall apply to a counterclaim, a claim under article 4, paragraph 2 (f), and a claim relied on for the purpose of a set-off.

Amendments to the claim or defence

Article 22

During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Pleas as to the jurisdiction of the arbitral tribunal

Article 23

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Further written statements

Article 24

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

Periods of time

Article 25

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Interim measures

Article 26

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

- (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such

harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

- (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

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

Evidence

Article 27

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

2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that

the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Hearings

Article 28

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

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.

4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

Experts appointed by the arbitral tribunal

Article 29

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

2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.
3. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.
4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.
5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings.

Default

Article 30

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:
 - (a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;
 - (b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings

continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

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

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Closure of hearings

Article 31

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

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

Waiver of right to object

Article 32

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

Section IV. The award

Decisions

Article 33

1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Form and effect of the award

Article 34

1. The arbitral tribunal may make separate awards on different issues at different times.
2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and it shall contain the date on which the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.
5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.
6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

Applicable law, amiable compositeur

Article 35

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.
2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so.
3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

Settlement or other grounds for termination

Article 36

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.
2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so.
3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 34, paragraphs 2, 4 and 5, shall apply.

Interpretation of the award

Article 37

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.
2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 34, paragraphs 2 to 6, shall apply.

Correction of the award

Article 38

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.
2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.
3. Such corrections shall be in writing and shall form part of the award. The provisions of article 34, paragraphs 2 to 6, shall apply.

Additional award

Article 39

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.
2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.

3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

Definition of costs

Article 40

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
- (b) The reasonable travel and other expenses incurred by the arbitrators;
- (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

Fees and expenses of arbitrators

Article 41

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

2. If there is an appointing authority and it applies or has stated that it will apply a schedule or particular method for determining the fees for arbitrators in international cases, the arbitral tribunal in

fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case.

3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.

4. (a) When informing the parties of the arbitrators' fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;

(b) Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;

(c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;

(d) Any such adjustments shall either be included by the arbitral tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply.

5. Throughout the procedure under paragraphs 3 and 4, the arbitral tribunal shall proceed with the arbitration, in accordance with article 17, paragraph 1.

6. A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal's fees and expenses;

nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal's fees and expenses.

Allocation of costs

Article 42

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

Deposit of costs

Article 43

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 40, paragraphs 2 (a) to (c).
2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.
3. If an appointing authority has been agreed upon or designated, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal that it deems appropriate concerning the amount of such deposits and supplementary deposits.
4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

ANNEX

Model arbitration clause for contracts

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note. Parties should consider adding:

- (a) The appointing authority shall be ... [name of institution or person];
- (b) The number of arbitrators shall be ... [one or three];
- (c) The place of arbitration shall be ... [town and country];
- (d) The language to be used in the arbitral proceedings shall be

Possible waiver statement

Note. If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.

Waiver

The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.

Model statements of independence pursuant to article 11 of the Rules

No circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of

any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement.] I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

Note. Any party may consider requesting from the arbitrator the following addition to the statement of independence:

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.

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V.11-80167—April 2011—1,500

(English Translation from Spanish Original)

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
Washington, D.C.

Emilio Agustín Maffezini
Claimant

v.

Kingdom of Spain
Respondent

ICSID Case No. ARB/97/7

PROCEDURAL ORDER N° 2

1. The Kingdom of Spain, the Respondent in this arbitration proceeding, by document dated 3 July 1998, has filed an application for provisional measures. The Claimant by document dated 6 August 1999, requests the Tribunal to dismiss such application.
2. Specifically, the Respondent has requested the Tribunal to require the Claimant to post a guaranty, bond or similar instrument in the amount of the costs expected to be incurred by the Respondent in defending against this action.
3. The Respondent alleges that the claim is worthless and the Claimant's accusations groundless. Accordingly, the Respondent argues, the Claimant will lose this action and should, therefore, be required to reimburse the Respondent for all its costs and expenses incurred in defending against this claim.

4. Provisional measures have been ordered by previous ICSID tribunals [See for example, *Holiday Inns et al. v. Morocco* (ICSID Case No. ARB/72/1), and *MINE v. Guinea* (ICSID Case No. ARB/84/4).] However, the Tribunal has not found any ICSID case where provisional measures were ordered requiring the posting of a guaranty or bond to cover the costs and expenses to be incurred in the future by one of the parties.

5. Of course, the lack of precedent is not necessarily determinative of our competence to order provisional measures in a case where such measures fall within the purview of the Arbitration Rules and are required under the circumstances.

6. The issue of provisional measures is covered by both the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* and the *Rules of Procedure for Arbitration Proceedings* [Arbitration Rules.]

7. Article 47 of the Convention states;

Except as the parties otherwise agree, the Tribunal may, if it considers the circumstances so require, recommend any provisional measures which should be taken to preserve the respective interests of either party.

While Rule 39(1) states that

At any time during the proceedings a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

8. Thus, it is clear that an arbitral tribunal has the authority to recommend provisional measures.¹

¹ The Tribunal notes that the parties did not reserve the right to access national judicial or other authorities for the imposition of provisional remedies as required under Rule 39(5). Accordingly, they have relinquished this right.

9. While there is a semantic difference between the word ‘recommend’ as used in Rule 39 and the word ‘order’ as used elsewhere in the Rules to describe the Tribunal’s ability to require a party to take a certain action, the difference is more apparent than real. It should be noted that the Spanish text of that Rule uses also the word “dictación”. The Tribunal does not believe that the parties to the Convention meant to create a substantial difference in the effect of these two words. The Tribunal’s authority to rule on provisional measures is no less binding than that of a final award. Accordingly, for the purposes of this Order, the Tribunal deems the word ‘recommend’ to be of equivalent value as the word ‘order.’

10. The imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal. There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application.

11. We now turn to the Arbitration Rules and the language of the Convention to determine whether the provisional measures sought by the Respondent are capable of being ordered by the Tribunal.

12. Rule 39(1) specifies that a party may request

‘ . . . provisional measures for the preservation of its rights. . . . ’

13. The use of the present tense implies that such rights must exist at the time of the request, must not be hypothetical, nor are ones to be created in the future.

14. An example of an existing right would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the *status quo* of the property, thus preserving the rights of the party in the property.

15. However, in the instant case, we are unable to see what present rights are intended to be preserved. The Respondent alleges that it may be difficult or impossible for it to obtain reimbursement of its legal costs and expenses, *if the Claimant does not prevail and if the Tribunal orders the payment of additional costs and expenses to be paid by the Claimant.*

16. This claim contains several hypothetical situations.

17. One, whether the Respondent will prevail and two, whether the Tribunal will deem the Claimant's case to be of such nature as to require it to pay the Respondent the costs and expenses it will incur.

18. Obviously, at this point in the proceedings the Tribunal is unable to answer either of these two questions. These must remain, at least for the time being, as hypothetical issues concerning future events. While hypothetical issues are stimulating and academically challenging, they are beyond the ken of an arbitral tribunal determining real issues of fact and law.

19. Respondent alleges that the Claimant's claim is totally without merit, forcing the Respondent to spend unnecessary money on the costs and expenses incurred in defending against the Claimant's claim.

20. Expectations of success or failure in an arbitration or judicial case are conjectures. Until this Arbitral Tribunal hands down an award, no one can state with any certainty what its outcome will be. The meritoriousness of the Claimant's case will be decided by the Tribunal based on the law and the evidence presented to it.

21. A determination at this time which may cast a shadow on either party's ability to present its case is not acceptable. It would be improper for the Tribunal to pre-judge the Claimant's case by recommending provisional measures of this nature.

22. We now turn to the final question before the Tribunal on this issue of provisional measures.

23. Any preliminary measure to be ordered by an ICSID arbitral tribunal must relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters.

24. In this case, the subject matter in dispute relates to an investment in Spain by an Argentine investor while the request for provisional measures relates to a guarantee or bond to ensure payment of additional costs and expenses should the Claimant not prevail in the case.

25. It is clear that these are two separate issues. The issue of provisional measures is unrelated to the facts of the dispute before the Tribunal.

26. In this case, after review of the Respondent's and Claimant's briefs, the oral arguments, as well as our review of the applicable law, we find that the Respondent has failed to demonstrate that the imposition of an order for provisional measures is warranted.

27. Accordingly, the Arbitral Tribunal hereby ORDERS the Respondent's application for provisional measures DISMISSED.

Francisco Orrego Vicuña
President of the Tribunal

Date: October 28, 1999.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**CERTAIN ACTIVITIES CARRIED OUT
BY NICARAGUA
IN THE BORDER AREA**

(COSTA RICA *v.* NICARAGUA)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER OF 8 MARCH 2011

2011

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**CERTAINES ACTIVITÉS MENÉES
PAR LE NICARAGUA
DANS LA RÉGION FRONTALIÈRE**

(COSTA RICA *c.* NICARAGUA)

DEMANDE EN INDICATION
DE MESURES CONSERVATOIRES

ORDONNANCE DU 8 MARS 2011

Official citation:

*Certain Activities Carried Out by Nicaragua in the Border Area
(Costa Rica v. Nicaragua), Provisional Measures,
Order of 8 March 2011, I.C.J. Reports 2011, p. 6*

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8 MARCH 2011

ORDER

CERTAIN ACTIVITIES CARRIED OUT
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CERTAINES ACTIVITÉS MENÉES
PAR LE NICARAGUA
DANS LA RÉGION FRONTALIÈRE

(COSTA RICA c. NICARAGUA)

DEMANDE EN INDICATION
DE MESURES CONSERVATOIRES

8 MARS 2011

ORDONNANCE

INTERNATIONAL COURT OF JUSTICE

YEAR 2011

2011
8 March
General List
No. 150

8 March 2011

CERTAIN ACTIVITIES CARRIED OUT
BY NICARAGUA
IN THE BORDER AREA

(COSTA RICA v. NICARAGUA)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

ORDER

Present: President OWADA; Vice-President TOMKA; Judges KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CAÑADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; Judges ad hoc GUILLAUME, DUGARD; Registrar COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. Whereas by an Application filed in the Registry of the Court on 18 November 2010, the Republic of Costa Rica (hereinafter “Costa Rica”) instituted proceedings against the Republic of Nicaragua (herein-

COUR INTERNATIONALE DE JUSTICE

ANNÉE 2011

8 mars 2011

2011
8 mars
Rôle général
n° 150

CERTAINES ACTIVITÉS MENÉES
PAR LE NICARAGUA
DANS LA RÉGION FRONTALIÈRE

(COSTA RICA c. NICARAGUA)

DEMANDE EN INDICATION
DE MESURES CONSERVATOIRES

ORDONNANCE

Présents: M. OWADA, *président*; M. TOMKA, *vice-président*; MM. KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, M^{mes} XUE, DONOGHUE, *juges*; MM. GUILLAUME, DUGARD, *juges ad hoc*; M. COUVREUR, *greffier*.

La Cour internationale de Justice,

Ainsi composée,

Après délibéré en chambre du conseil,

Vu les articles 41 et 48 du Statut de la Cour et les articles 73, 74 et 75 de son Règlement,

Rend l'ordonnance suivante:

1. Considérant que, par requête déposée au Greffe de la Cour le 18 novembre 2010, la République du Costa Rica (ci-après le «Costa Rica») a introduit une instance contre la République du Nicaragua (ci-après le

after “Nicaragua”) on the basis of an alleged “incursion into, occupation of and use by Nicaragua’s army of Costa Rican territory” as well as alleged breaches of Nicaragua’s obligations towards Costa Rica under:

- “(a) the Charter of the United Nations and the Charter of the Organization of American States;
- (b) the Treaty of Territorial Limits between Costa Rica and Nicaragua of 15 April 1858 . . . , in particular Articles I, II, V and IX;
- (c) the arbitral award issued by the President of the United States of America, Grover Cleveland, on 22 March 1888 . . . ;
- (d) the first and second arbitral awards rendered by Edward Porter Alexander dated respectively 30 September 1897 and 20 December 1897 . . . ;
- (e) the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat . . . ;
- (f) the Judgment of the Court of 13 July 2009 in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*; and
- (g) other applicable rules and principles of international law”;

2. Whereas Costa Rica states in its Application that

“[b]y sending contingents of its armed forces to Costa Rican territory and establishing military camps therein, Nicaragua is not only acting in outright breach of the established boundary regime between the two States, but also of the core founding principles of the United Nations, namely the principles of territorial integrity and the prohibition of the threat or use of force against any State in accordance with Article 2, paragraph 4, of the Charter; also endorsed as between the parties in Articles 1, 19 and 29 of the Charter of the Organization of American States”;

3. Whereas Costa Rica contends in the said Application that

“Nicaragua has, in two separate incidents, occupied the territory of Costa Rica in connection with the construction of a canal across Costa Rican territory from the San Juan River to Laguna los Portillos (also known as Harbor Head Lagoon), and certain related works of dredging on the San Juan River”;

whereas it states that during the first incursion, which occurred on or about 18 October 2010, Nicaragua was reported “felling trees and depositing sediment from the dredging works on Costa Rican territory”; whereas it adds that, “[a]fter a brief withdrawal, on or about 1 Novem-

«Nicaragua») à raison d'une prétendue «incursion en territoire costaricien de l'armée nicaraguayenne», qui occupe et utilise une partie de celui-ci, ainsi que de prétendues violations par le Nicaragua d'obligations lui incombant envers le Costa Rica en vertu :

- a) [de] la Charte des Nations Unies et [de] la Charte de l'Organisation des Etats américains;
- b) [du] traité de limites entre le Costa Rica et le Nicaragua, conclu le 15 avril 1858..., en particulier ses articles I, II, V et IX;
- c) [de] la sentence arbitrale rendue le 22 mars 1888 par le président des Etats-Unis d'Amérique, Grover Cleveland...;
- d) [des] première et deuxième sentences arbitrales rendues par Edward Porter Alexander en date respectivement du 30 septembre 1897 et du 20 décembre 1897...;
- e) [de] la convention de 1971 relative aux zones humides d'importance internationale, particulièrement comme habitats des oiseaux d'eau...;
- f) [de] l'arrêt rendu par la Cour le 13 juillet 2009 en l'affaire du *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*;
- g) d'autres règles et principes applicables du droit international»;

2. Considérant que le Costa Rica, dans sa requête, soutient que,

«[e]n dépêchant des contingents de ses forces armées en territoire costaricien et en y faisant établir des campements militaires, le Nicaragua agit en violation flagrante non seulement du régime frontalier établi entre les deux Etats, mais aussi des grands principes fondateurs des Nations Unies, à savoir le principe de l'intégrité territoriale et celui de l'interdiction du recours à la menace ou à l'emploi de la force contre tout Etat, tels qu'affirmés au paragraphe 4 de l'article 2 de la Charte, et auxquels les Parties ont réaffirmé leur adhésion aux articles premier, 19 et 29 de la Charte de l'Organisation des Etats américains»;

3. Considérant que le Costa Rica affirme, dans ladite requête, que

«[l]e Nicaragua, à l'occasion de deux incidents distincts, a occupé le sol costaricien dans le cadre de la construction d'un canal à travers le territoire du Costa Rica, entre le fleuve San Juan et la lagune de los Portillos (également connue sous le nom de «lagune de Harbor Head»), et de certaines activités connexes de dragage menées dans le San Juan»;

qu'il indique que, lors de la première incursion, intervenue le 18 octobre 2010 ou autour de cette date, le Nicaragua, selon certaines informations, a procédé «à l'abattage d'arbres et au déversement en territoire costaricien de sédiments provenant des travaux de dragage»; qu'il ajoute

ber 2010 a second contingent of Nicaraguan troops entered Costa Rican territory and established a camp”;

4. Whereas Costa Rica maintains that “[t]his second incursion has resulted in the continuing occupation by armed Nicaraguan military forces of an initial area of around 3 square kilometres of Costa Rican territory, located at the north-east Caribbean tip of Costa Rica”, but that “evidence shows that Nicaraguan military forces have also ventured further inside Costa Rican territory, to the south of that area”; whereas it contends that Nicaragua has “also seriously damaged that part of Costa Rican territory under its occupation”;

5. Whereas Costa Rica also asserts in the said Application that “[t]he ongoing and planned dredging and the construction of the canal will seriously affect the flow of water to the Colorado River of Costa Rica, and will cause further damage to Costa Rican territory, including the wetlands and national wildlife protected areas located in the region”;

6. Whereas, relying on statements made by the Nicaraguan head of the dredging operations and the President of Nicaragua, Costa Rica asserts that Nicaragua is seeking to divert the flow of the San Juan River to what that State erroneously describes as its “historic channel” by cutting a canal which would join the seaward course of the river to the Laguna los Portillos; whereas, in so doing, Nicaragua would cause harm to an area of territory which Costa Rica maintains, for the reasons set out at length in its Application, falls under its sovereignty;

7. Whereas Costa Rica contends in particular that the border line, which it claims Nicaragua is violating by its military and dredging operations, has for the last 113 years “consistently been respected and depicted, in all official maps of both countries, as constituting the international boundary line between Costa Rica and Nicaragua”;

8. Whereas in its Application, as a basis for the jurisdiction of the Court, Costa Rica refers to Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the “Pact of Bogotá”) and to the declarations made under Article 36, paragraph 2, of the Statute of the Court, by Costa Rica on 20 February 1973 and by Nicaragua on 24 September 1929 (as amended on 23 October 2001);

9. Whereas, at the end of its Application, Costa Rica presents the following submissions:

“For these reasons, and reserving the right to supplement, amplify or amend the present Application, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application as regards the incursion into and occupation of Costa Rican

que, «[a]près un bref retrait, un second contingent de troupes nicaraguayennes est entré en territoire costa-ricien le 1^{er} novembre ou autour de cette date et y a établi un campement»;

4. Considérant que le Costa Rica précise que, depuis cette seconde incursion, des membres des forces armées du Nicaragua «occupent de façon continue une partie du territoire costa-ricien d'une superficie initiale de quelque trois kilomètres carrés, à l'extrémité nord-est du Costa Rica, du côté de la mer des Caraïbes», mais que, «selon certaines indications, les forces militaires nicaraguayennes se seraient également enfoncées en territoire costa-ricien au sud de cette zone»; qu'il soutient que le Nicaragua a «en outre causé des dommages importants dans la partie du territoire costa-ricien occupée»;

5. Considérant que, dans ladite requête, le Costa Rica fait encore valoir que «les travaux de dragage actuels et prévus, ainsi que la construction du canal, altéreront gravement le débit des eaux alimentant le Colorado, cours d'eau costa-ricien, et causeront d'autres dommages [à son] territoire..., notamment aux zones humides et aux réserves nationales de flore et de faune sauvages de la région»;

6. Considérant que, s'appuyant sur des déclarations émanant du responsable nicaraguayen des opérations de dragage et du président du Nicaragua, le Costa Rica soutient que le Nicaragua vise à détourner le cours du fleuve San Juan vers ce que cet Etat considère erronément être le «chenal primitif» de ce fleuve par le creusement d'un canal qui relierait ledit fleuve, en direction de la mer, à la lagune de los Portillos; que, ce faisant, le Nicaragua porterait atteinte à une partie du territoire que le Costa Rica affirme, pour des motifs longuement exposés dans la requête, relever de sa souveraineté;

7. Considérant que le Costa Rica souligne notamment que la ligne frontière que, selon lui, le Nicaragua viole par ses opérations militaires et de dragage a, au cours des cent treize dernières années, «systématiquement été reprise et représentée, sur toutes les cartes officielles des deux pays, comme constituant la frontière internationale entre le Costa Rica et le Nicaragua»;

8. Considérant que, dans sa requête, le Costa Rica se réfère, pour fonder la compétence de la Cour, à l'article XXXI du traité américain de règlement pacifique des différends signé à Bogotá le 30 avril 1948 (ci-après le «pacte de Bogotá») et aux déclarations faites, en application du paragraphe 2 de l'article 36 du Statut de la Cour, par le Costa Rica le 20 février 1973 et par le Nicaragua le 24 septembre 1979 (déclaration telle que modifiée le 23 octobre 2001);

9. Considérant qu'au terme de sa requête le Costa Rica formule les demandes suivantes:

«Pour ces motifs, tout en se réservant le droit de compléter, préciser ou modifier la présente requête, le Costa Rica prie la Cour de dire et juger que le Nicaragua viole ses obligations internationales mentionnées au paragraphe 1 de la présente requête, à raison de son incursion en territoire costa-ricien et de l'occupation d'une partie de

territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River.

In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has breached:

- (a) the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;
- (b) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;
- (c) the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;
- (d) the obligation not to damage Costa Rican territory;
- (e) the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;
- (f) the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;
- (g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;
- (h) the obligations under the Ramsar Convention on Wetlands;
- (i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica's territorial integrity under international law";

10. Whereas Costa Rica also requests the Court to “determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to . . . above” (para. 9);

11. Whereas on 18 November 2010, having filed its Application, Costa Rica also submitted a Request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court;

12. Whereas, in its Request for the indication of provisional measures, Costa Rica refers to the same bases of jurisdiction of the Court relied on in its Application (see paragraph 8 above) and to the facts set out therein;

celui-ci, des graves dommages causés à ses forêts pluviales et zones humides protégées, des dommages qu'il entend causer au Colorado, à ses zones humides et à ses écosystèmes protégés, ainsi que des activités de dragage et de creusement d'un canal qu'il mène actuellement dans le fleuve San Juan.

En particulier, le Costa Rica prie la Cour de dire et juger que, par son comportement, le Nicaragua a violé :

- a) le territoire de la République du Costa Rica, tel qu'il a été convenu et délimité par le traité de limites de 1858, la sentence Cleveland ainsi que les première et deuxième sentences Alexander ;
- b) les principes fondamentaux de l'intégrité territoriale et de l'interdiction de l'emploi de la force consacrés par la Charte des Nations Unies et la Charte de l'Organisation des Etats américains ;
- c) l'obligation faite au Nicaragua par l'article IX du traité de limites de 1858 de ne pas utiliser le San Juan pour perpétrer des actes d'hostilité ;
- d) l'obligation de ne pas causer de dommages au territoire costaricien ;
- e) l'obligation de ne pas dévier artificiellement le San Juan de son cours naturel sans le consentement du Costa Rica ;
- f) l'obligation de ne pas interdire la navigation de ressortissants costariciens sur le San Juan ;
- g) l'obligation de ne pas mener d'opérations de dragage dans le San Juan si ces activités ont un effet dommageable pour le territoire costaricien (y compris le Colorado), conformément à la sentence Cleveland de 1888 ;
- h) les obligations découlant de la convention de Ramsar sur les zones humides ;
- i) l'obligation de ne pas aggraver ou étendre le différend, que ce soit par des actes visant le Costa Rica, et consistant notamment à étendre la portion de territoire costaricien envahie et occupée, ou par l'adoption de toute autre mesure ou la conduite d'activités qui porteraient atteinte à l'intégrité territoriale du Costa Rica en violation du droit international » ;

10. Considérant que le Costa Rica prie également la Cour de « déterminer les réparations dues par le Nicaragua à raison, en particulier, de toute mesure du type de celles qui sont mentionnées » ci-dessus (par. 9) ;

11. Considérant que, le 18 novembre 2010, après avoir déposé sa requête, le Costa Rica a également présenté une demande en indication de mesures conservatoires en application de l'article 41 du Statut de la Cour et des articles 73 à 75 de son Règlement ;

12. Considérant que, dans sa demande en indication de mesures conservatoires, le Costa Rica renvoie aux bases de compétence de la Cour invoquées dans sa requête (voir paragraphe 8 ci-dessus), ainsi qu'aux faits qui sont exposés dans celle-ci ;

13. Whereas, in support of the said Request, Costa Rica states that

“Nicaragua is currently destroying an area of primary rainforests and fragile wetlands on Costa Rican territory (listed as such under the Ramsar Convention’s List of Wetlands of International Importance) for the purpose of facilitating the construction of a canal through Costa Rican territory, intended to deviate the waters of the San Juan River from its natural historical course into Laguna los Portillos (the Harbor Head Lagoon)”;

whereas it observes that “Nicaraguan officials have indicated that the intention of Nicaragua is to deviate some 1,700 cubic metres per second . . . of the water that currently is carried by the Costa Rican Colorado River”;

14. Whereas Costa Rica contends that it has regularly protested to Nicaragua and called on it not to dredge the San Juan River “until it can be established that the dredging operation will not damage the Colorado River or other Costa Rican territory”, but that Nicaragua has nevertheless continued with its dredging activities on the San Juan River and that it “even announced on 8 November 2010 that it would deploy two additional dredges to the San Juan River”, one of which is reportedly still under construction;

15. Whereas Costa Rica asserts that Nicaragua’s statements demonstrate “the likelihood of damage to Costa Rica’s Colorado River, and to Costa Rica’s lagoons, rivers, herbaceous swamps and woodlands”, the dredging operation posing more specifically “a threat to wildlife refuges in Laguna Maquenque, Barra del Colorado, Corredor Fronterizo and the Tortuguero National Park”;

16. Whereas Costa Rica refers to the adoption on 12 November 2010 of a resolution of the Permanent Council of the Organization of American States (CP/RES.978 (1777/10)), welcoming and endorsing the recommendations made by the Secretary-General of that Organization in his report of 9 November 2010 (CP/doc.4521/10); and whereas it states that the Permanent Council called on the Parties to comply with those recommendations, in particular that requesting “the avoidance of the presence of military or security forces in the area where their existence might rouse tension”;

17. Whereas Costa Rica asserts that Nicaragua’s “immediate response to the Resolution of the Permanent Council of the OAS was to state [its] intention not to comply with [it]” and that Nicaragua has “consistently refused all requests to remove its armed forces from the Costa Rican territory in Isla Portillos”;

18. Whereas Costa Rica affirms that its rights to sovereignty and territorial integrity form the subject of its Request for the indication of provisional measures submitted to the Court; whereas it maintains that Nicaragua’s obligation “not to dredge the San Juan if this affects or dam-

13. Considérant que, à l'appui de ladite demande, le Costa Rica soutient que,

«dans l'intention de faciliter la construction d'un canal sur le territoire costa-ricien en vue de faire dévier le cours historique naturel du San Juan vers la lagune de los Portillos (ou lagune de Harbor Head), le Nicaragua détruit actuellement une zone de forêts pluviales primaires ainsi que des zones humides fragiles situées en territoire costa-ricien (et inscrites sur la liste de la convention de Ramsar des zones humides d'importance internationale)»;

qu'il précise que les «responsables nicaraguayens ont indiqué que le Nicaragua avait l'intention de détourner une partie des eaux du Colorado, fleuve costa-ricien, équivalant à quelque 1700 mètres cubes par seconde»;

14. Considérant que le Costa Rica indique avoir régulièrement protesté auprès du Nicaragua et lui avoir demandé de s'abstenir de draguer le fleuve San Juan «jusqu'à ce qu'il puisse être établi que ses opérations ne causeront aucun dommage au Colorado ou à d'autres parties du territoire costa-ricien», mais que le Nicaragua a néanmoins poursuivi ses activités de dragage du fleuve San Juan et qu'il «a même annoncé, le 8 novembre 2010, qu'il déploierait deux dragues supplémentaires sur le fleuve», dont l'une serait encore en cours de construction;

15. Considérant que le Costa Rica estime que les déclarations du Nicaragua démontrent que «le Colorado, fleuve costa-ricien, ainsi que les lagunes, rivières, prairies marécageuses et zones boisées du Costa Rica risquent de subir des dommages», l'opération de dragage représentant plus précisément «une menace à l'encontre des réserves naturelles de Laguna Maquenque, Barra del Colorado et Corredor Fronterizo et du parc national Tortuguero»;

16. Considérant que le Costa Rica fait état de l'adoption, le 12 novembre 2010, d'une résolution du conseil permanent de l'Organisation des Etats américains (CP/RES.978 (1777/10)) accueillant et faisant siennes les recommandations du secrétaire général de ladite organisation contenues dans son rapport du 9 novembre 2010 (CP/doc.4521/10); et qu'il indique que le conseil permanent a appelé les Parties à adopter ces recommandations, parmi lesquelles celle consistant à «éviter la présence de forces armées ou de sécurité dans la zone où une telle présence pourrait créer des tensions»;

17. Considérant que le Costa Rica affirme que le Nicaragua «a répondu immédiatement à la résolution du conseil permanent de l'OEA en faisant part de son intention de ne pas la respecter» et qu'il a «systématiquement rejeté toutes les demandes visant au retrait de ses forces armées du territoire costa-ricien de l'île de Portillos»;

18. Considérant que le Costa Rica expose que ses droits à la souveraineté et à l'intégrité territoriale forment l'objet de la demande en indication de mesures conservatoires qu'il a présentée à la Cour; qu'il souligne que, à ces droits, correspond dans le chef du Nicaragua l'obligation «de ne

ages Costa Rica's lands, its environmentally protected areas and the integrity and flow of the Colorado River" corresponds to these rights;

19. Whereas, at the end of its Request for the indication of provisional measures, Costa Rica asks the Court

“as a matter of urgency to order the following provisional measures so as to rectify the presently ongoing breach of Costa Rica's territorial integrity and to prevent further irreparable harm to Costa Rica's territory, pending its determination of this case on the merits:

- (1) the immediate and unconditional withdrawal of all Nicaraguan troops from the unlawfully invaded and occupied Costa Rican territories;
- (2) the immediate cessation of the construction of a canal across Costa Rican territory;
- (3) the immediate cessation of the felling of trees, removal of vegetation and soil from Costa Rican territory, including its wetlands and forests;
- (4) the immediate cessation of the dumping of sediment in Costa Rican territory;
- (5) the suspension of Nicaragua's ongoing dredging programme, aimed at the occupation, flooding and damage of Costa Rican territory, as well as at the serious damage to and impairment of the navigation of the Colorado River, giving full effect to the Cleveland Award and pending the determination of the merits of this dispute;
- (6) that Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court”;

20. Whereas on 18 November 2010, the date on which the Application and the Request for the indication of provisional measures were filed in the Registry, the Registrar informed the Nicaraguan Government of the filing of these documents and transmitted certified copies of them to it forthwith, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also notified the Secretary-General of the United Nations of this filing;

21. Whereas on 19 November 2010 the Registrar informed the Parties that the Court, in accordance with Article 74, paragraph 3, of the Rules of Court, had fixed 11, 12 and 13 January 2011 as the dates for the oral proceedings on the Request for the indication of provisional measures;

22. Whereas, pending the notification provided for by Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court by transmission of the printed bilingual text of the Application to the Members of the

pas draguer le San Juan si cela affecte ou endommage le territoire du Costa Rica, ses zones naturelles protégées ainsi que l'intégrité et le débit du Colorado»;

19. Considérant que, au terme de sa demande en indication de mesures conservatoires, le Costa Rica prie la Cour,

«dans l'attente de la décision qu'elle rendra sur le fond de l'affaire, d'ordonner d'urgence les mesures conservatoires suivantes, de sorte à remédier à l'atteinte actuellement portée à son intégrité territoriale et à empêcher que de nouveaux dommages irréparables ne soient causés à son territoire :

- 1) retrait immédiat et inconditionnel de toutes les forces nicaraguayennes des parties du territoire costa-ricien envahies et occupées de manière illicite ;
- 2) cessation immédiate du percement d'un canal en territoire costa-ricien ;
- 3) cessation immédiate de l'abattage d'arbres, de l'enlèvement de végétation et des travaux d'excavation en territoire costa-ricien, notamment dans les zones humides et les forêts ;
- 4) cessation immédiate du déversement de sédiments en territoire costa-ricien ;
- 5) suspension, par le Nicaragua, du programme de dragage en cours, mis en œuvre par celui-ci en vue d'occuper et d'inonder le territoire costa-ricien et de causer des dommages à celui-ci ainsi qu'en vue de porter un lourd préjudice à la navigation sur le Colorado ou de la perturber gravement, suspension requise pour donner plein effet à la sentence Cleveland dans l'attente de la décision sur le fond du présent différend ;
- 6) obligation faite au Nicaragua de s'abstenir de toute autre action qui soit de nature à porter préjudice aux droits du Costa Rica ou à aggraver ou étendre le différend porté devant la Cour» ;

20. Considérant que, le 18 novembre 2010, date à laquelle la requête et la demande en indication de mesures conservatoires ont été déposées au Greffe, le greffier a informé le Gouvernement nicaraguayen du dépôt de ces documents et lui en a adressé immédiatement des copies certifiées conformes en application du paragraphe 2 de l'article 40 du Statut de la Cour, ainsi que du paragraphe 4 de l'article 38 et du paragraphe 2 de l'article 73 de son Règlement ; et que le greffier a également informé le Secrétaire général de l'Organisation des Nations Unies de ce dépôt ;

21. Considérant que, le 19 novembre 2010, le greffier a informé les Parties que la Cour, en application du paragraphe 3 de l'article 74 de son Règlement, avait fixé aux 11, 12 et 13 janvier 2011 les dates de la procédure orale sur la demande en indication de mesures conservatoires ;

22. Considérant que, en attendant que la communication prévue au paragraphe 3 de l'article 40 du Statut et à l'article 42 du Règlement ait été effectuée par transmission du texte bilingue imprimé de la requête aux

United Nations, the Registrar informed those States of the filing of the Application and its subject, and of the filing of the Request for the indication of provisional measures;

23. Whereas, on the instructions of the Court and in accordance with Article 43 of the Rules of Court, the Registrar addressed to all the States parties to the Pact of Bogotá the notification provided for in Article 63, paragraph 1, of the Statute; and whereas the Registrar also addressed to the Secretary-General of the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute;

24. Whereas, since the Court includes upon the Bench no judge of the nationality of the Parties, each of them proceeded, in exercise of the right conferred by Article 31, paragraph 3, of the Statute, to choose a judge *ad hoc* in the case; whereas, for this purpose, Costa Rica chose Mr. John Dugard, and Nicaragua chose Mr. Gilbert Guillaume;

25. Whereas on 4 January 2011 Costa Rica transmitted to the Court certain documents relating to the Request for the indication of provisional measures, to which it intended to refer during the oral proceedings; whereas these documents were communicated forthwith to the other Party;

26. Whereas, on the same day and to the same end, Nicaragua in turn transmitted certain documents to the Court, which were communicated forthwith to the other Party; whereas on the same occasion Nicaragua filed in the Registry electronic copies of documents, including video material which it intended to present to the Court during the oral proceedings; whereas Costa Rica informed the Registrar that it had no objection to such a presentation; and whereas the Court authorized the presentation of the video material at the hearings;

27. Whereas, on 4 January 2011, Nicaragua also asked the Court, in the exercise of its power under Article 62, paragraph 1, of the Rules of Court, to call upon Costa Rica to produce, before the opening of the oral proceedings, studies it had carried out with regard to the impact of the dredging of the San Juan River on the flow of the Colorado River; whereas, following this request, Costa Rica produced such a study on its own initiative on 6 January 2011;

28. Whereas on 10 January 2011 Costa Rica also transmitted to the Court electronic versions of a Nicaraguan atlas from which it intended to produce certain maps during the oral proceedings; whereas this document was communicated forthwith to Nicaragua;

29. Whereas at the public hearings held on 11, 12 and 13 January 2011, in accordance with Article 74, paragraph 3, of the Rules of Court, oral observations on the Request for the indication of provisional measures were presented the following representatives of the Parties:

On behalf of Costa Rica: H.E. Mr. Edgar Ugalde Álvarez, *Agent*,
Mr. Arnaldo Brenes,
Mr. Sergio Ugalde, *Co-Agent*,
Mr. Marcelo Kohen,
Mr. James Crawford;

Membres des Nations Unies, le greffier a informé ces Etats du dépôt de la requête et de son objet, ainsi que du dépôt de la demande en indication de mesures conservatoires;

23. Considérant que, sur les instructions de la Cour et conformément à l'article 43 du Règlement, le greffier a adressé la notification prévue au paragraphe 1 de l'article 63 du Statut à tous les Etats parties au pacte de Bogotá; et que le greffier a en outre adressé au secrétaire général de l'Organisation des Etats américains la notification prévue au paragraphe 3 de l'article 34 du Statut;

24. Considérant que, la Cour ne comptant sur le siège aucun juge de la nationalité des Parties, chacune d'elles a procédé, dans l'exercice du droit que lui confère le paragraphe 3 de l'article 31 du Statut, à la désignation d'un juge *ad hoc* en l'affaire; que le Costa Rica a désigné à cet effet M. John Dugard et le Nicaragua M. Gilbert Guillaume;

25. Considérant que, le 4 janvier 2011, le Costa Rica a transmis à la Cour certains documents relatifs à la demande en indication de mesures conservatoires, auxquels il entendait se référer durant la procédure orale; que ces documents ont été immédiatement transmis à l'autre Partie;

26. Considérant que, le même jour et à la même fin, le Nicaragua a, à son tour, fait parvenir à la Cour certains documents, lesquels ont été immédiatement transmis à l'autre Partie; que, à la même occasion, le Nicaragua a déposé au Greffe des copies électroniques de documents, dont un film vidéo, qu'il a indiqué vouloir présenter à la Cour lors de la procédure orale; que le Costa Rica a informé le greffier qu'il n'avait pas d'objection à cet égard; et que la Cour a autorisé la présentation du film vidéo lors des audiences;

27. Considérant que, le 4 janvier 2011, le Nicaragua a également demandé à la Cour, dans l'exercice du pouvoir que lui confère le paragraphe 1 de l'article 62 du Règlement, d'inviter le Costa Rica à produire, avant l'ouverture de la procédure orale, les études auxquelles il avait procédé concernant l'impact du dragage du fleuve San Juan sur le débit du fleuve Colorado; que, à la suite de cette demande, le Costa Rica a spontanément produit une telle étude le 6 janvier 2011;

28. Considérant que, le 10 janvier 2011, le Costa Rica a encore fait parvenir à la Cour des versions électroniques d'un atlas nicaraguayen dont il a indiqué vouloir produire certaines cartes durant la procédure orale; que ce document a été immédiatement transmis au Nicaragua;

29. Considérant que, au cours des audiences publiques tenues les 11, 12 et 13 janvier 2011 en vertu du paragraphe 3 de l'article 74 du Règlement, des observations orales sur la demande en indication de mesures conservatoires ont été présentées par:

Au nom du Costa Rica: S. Exc. M. Edgar Ugalde Álvarez, *agent*,
M. Arnoldo Brenes,
M. Sergio Ugalde, *coagent*,
M. Marcelo Kohén,
M. James Crawford;

On behalf of Nicaragua: H.E. Mr. Carlos José Argüello Gómez, *Agent*,
Mr. Stephen C. McCaffrey,
Mr. Paul S. Reichler,
Mr. Alain Pellet;

and whereas, during the hearings, questions were put by certain Members of the Court to Nicaragua, to which replies were given in writing by the latter; whereas, in accordance with Article 72 of the Rules of Court, Costa Rica then commented upon Nicaragua's written replies;

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30. Whereas, in its first round of oral observations, Costa Rica reiterated the arguments developed in its Application and its Request for the indication of provisional measures, and argued that the conditions necessary for the Court to indicate the requested measures had been fulfilled;

31. Whereas Costa Rica reaffirmed that, without its consent, Nicaragua has constructed an artificial canal across an area of Costa Rican territory unlawfully occupied by Nicaraguan armed forces; whereas, to this end, Nicaragua is said to have illegally deforested areas of internationally protected primary forests; and whereas, according to Costa Rica, Nicaragua's actions have caused serious damage to a fragile ecosystem and are aimed at establishing a *fait accompli*, modifying unilaterally the boundary between the two Parties, by attempting to deviate the course of the San Juan River, in spite of the Respondent's "constant, unambiguous [and] incontestable" recognition of the Applicant's sovereignty over Isla Portillos, which the said canal would henceforth intersect;

32. Whereas Costa Rica declared that it is not opposed to Nicaragua carrying out works to clean the San Juan River, provided that these works do not affect Costa Rica's territory, including the Colorado River, or its navigation rights on the San Juan River, or its rights in the Bay of San Juan del Norte; whereas Costa Rica asserted that the dredging works carried out by Nicaragua on the San Juan River did not comply with these conditions, firstly because Nicaragua has deposited large amounts of sediment from the river in the Costa Rican territory it is occupying and has proceeded to deforest certain areas; secondly, because these works, and those relating to the cutting of the disputed canal, have as a consequence the significant deviation of the waters of the Colorado River, which is situated entirely in Costa Rican territory; and, thirdly, because these dredging works will spoil portions of Costa Rica's northern coast on the Caribbean Sea;

33. Whereas Costa Rica asserted that the part of its territory affected by Nicaragua's activities is protected under the Convention on Wetlands

Au nom du Nicaragua: S. Exc. M. Carlos José Argüello Gómez, *agent*,
M. Stephen C. McCaffrey,
M. Paul S. Reichler,
M. Alain Pellet;

et qu'au cours des audiences des questions ont été posées par certains membres de la Cour au Nicaragua, questions auxquelles ce dernier a apporté des réponses par écrit; que, conformément à l'article 72 du Règlement, le Costa Rica a ensuite présenté des observations sur les réponses écrites du Nicaragua;

* * *

30. Considérant que, lors de son premier tour d'observations orales, le Costa Rica a réitéré l'argumentation développée dans sa requête et sa demande en indication de mesures conservatoires, et a avancé que les conditions requises pour que la Cour indique les mesures demandées étaient remplies;

31. Considérant que le Costa Rica a réaffirmé que, sans son consentement, le Nicaragua a creusé un canal artificiel à travers une partie du territoire costa-ricien illégalement occupé par ses forces armées; que le Nicaragua a, à cette fin, illégalement déboisé des zones de forêts primaires internationalement protégées; et que, selon le Costa Rica, les actions du Nicaragua ont entraîné des dommages importants à un écosystème fragile et ont pour objectif d'établir un fait accompli modifiant unilatéralement la frontière entre les deux Parties par une tentative de déviation du cours du fleuve San Juan, alors que l'Etat défendeur a, de manière « constante, dépourvue d'ambiguïté [et] irrefragable », reconnu la souveraineté de l'Etat demandeur sur Isla Portillos, que ledit canal couperait désormais;

32. Considérant que le Costa Rica a déclaré ne pas s'opposer à ce que le Nicaragua entreprenne des travaux de nettoyage du fleuve San Juan, pour autant que ces travaux n'affectent pas son territoire, y compris le fleuve Colorado, son droit de navigation sur le fleuve San Juan, ni ses droits sur la baie de San Juan del Norte; que le Costa Rica a fait valoir que les travaux de dragage du fleuve San Juan entrepris par le Nicaragua n'ont pas respecté ces conditions car, premièrement, le Nicaragua a déversé d'importantes quantités de sédiments retirés du fleuve sur le territoire costa-ricien qu'il occupe et a, à certains endroits, procédé à des actions de déboisement, deuxièmement, ces travaux, ainsi que ceux relatifs au creusement du canal litigieux, ont pour conséquence de détourner de manière significative les eaux du fleuve Colorado, lequel se trouve entièrement en territoire costa-ricien, et, troisièmement, ces travaux de dragage altéreront des parties du littoral nord du Costa Rica sur la mer des Caraïbes;

33. Considérant que le Costa Rica a souligné que la partie de son territoire affectée par les activités du Nicaragua est protégée au titre de

of International Importance especially as Waterfowl Habitat, done at Ramsar on 2 February 1971 (*United Nations Treaty Series (UNTS)*, Vol. 996, No. I-14583, p. 245, hereinafter the “Ramsar Convention”), and that on 17 December 2010, further to a mission, a report by the Ramsar Secretariat (hereinafter the “Ramsar Report”) stated that the work undertaken by Nicaragua had inflicted serious damage on the protected wetlands; whereas Costa Rica also referred to a report of 4 January 2011 drawn up by the Operational Satellite Applications Programme of the United Nations Institute for Training and Research (hereinafter the “UNITAR/UNOSAT report”) relating to the geomorphological and environmental changes likely to be caused by Nicaragua’s activities in the border region;

34. Whereas, according to Costa Rica, the Court is not seized of a boundary dispute arising from a divergence of interpretation, between the Parties, of a treaty or an arbitral award, because, until the unexpected emergence of the present dispute, Nicaragua had always recognized Isla Portillos as falling in its entirety under Costa Rican sovereignty; whereas, to this end, Costa Rica recalled the history and substance of the territorial demarcation between the Parties through the 1858 Treaty of Limits, the 1888 Cleveland Award, the 1896 Pacheco-Matus Convention and the five arbitral awards of General Alexander; whereas, in support of its assertions, it produced a number of maps, including some drawn up at the time of the above-mentioned awards and, more recently, by Nicaragua itself or by third States; and whereas Costa Rica maintained that Nicaragua is attempting, in a new and artificial way, to portray these proceedings as a territorial dispute, even though it is indisputably established that, from the point on the coast originally identified as Punta Castilla, the boundary runs all around the Harbor Head Lagoon and along the sea coast of Isla Portillos before joining the mouth of the San Juan River, in such a way that the canal cut by Nicaragua across Isla Portillos is on Costa Rican territory;

35. Whereas Costa Rica also asserted that its title to territory was confirmed by *effectivités*, namely the exercise of elements of governmental authority in the disputed territory, including the deeds of possession inscribed in the Costa Rican cadastre;

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36. Whereas, in its first round of oral observations, Nicaragua stated that the activities it is accused of by Costa Rica took place on Nicaraguan territory and that they did not cause, nor do they risk causing, irreparable harm to the other Party;

37. Whereas, referring to the first Alexander Award dated 30 September 1897 (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, pp. 215-222), Nicaragua maintained that, from the point

la convention relative aux zones humides d'importance internationale, particulièrement comme habitats des oiseaux d'eau, faite à Ramsar le 2 février 1971 (*Recueil des traités des Nations Unies (RTNU)*, vol. 996, n° I-14583, p. 245, ci-après la «convention de Ramsar») et que, le 17 décembre 2010, le Secrétariat de ladite convention a, à la suite d'une mission, présenté un rapport (ci-après le «rapport Ramsar») selon lequel les travaux entrepris par le Nicaragua avaient causé un dommage important à cette zone humide protégée; que le Costa Rica a encore fait état d'un rapport du 4 janvier 2011 établi par le Programme opérationnel pour les opérations satellitaires de l'Institut des Nations Unies pour la formation et la recherche (ci-après «rapport UNITAR/UNOSAT») relatif aux changements géomorphologiques et environnementaux susceptibles d'être causés par les activités du Nicaragua dans la région frontalière;

34. Considérant que, selon le Costa Rica, la Cour n'est pas saisie d'un différend frontalier né d'une divergence d'interprétation, entre les Parties, d'un traité ou d'une sentence arbitrale, dès lors que le Nicaragua a, jusqu'à la survenance du présent litige, continuellement reconnu que Isla Portillos relevait, dans sa totalité, de la souveraineté du Costa Rica; que le Costa Rica a retracé à cette fin l'histoire et le contenu de la démarcation territoriale entre les Parties, à travers le traité de limites de 1858, la sentence du président Cleveland de 1888, la convention Pacheco-Matus de 1896 et les cinq sentences du général Alexander; qu'il a produit à l'appui de ses affirmations un certain nombre de cartes, dont certaines ont été établies à l'époque desdites sentences, ou, plus récemment, par le Nicaragua lui-même ou des Etats tiers; et que le Costa Rica a soutenu que c'est de manière nouvelle et artificielle que le Nicaragua entend donner à la présente instance la nature d'un contentieux territorial, alors qu'il est incontestablement établi que, partant du point sur la côte originellement identifié comme étant Punta Castilla, la frontière longe tout le pourtour de la lagune de Harbor Head et la façade maritime de Isla Portillos avant de rejoindre l'embouchure du fleuve San Juan, de telle manière que le canal creusé par le Nicaragua à travers Isla Portillos est situé en territoire costa-ricien;

35. Considérant que le Costa Rica a encore affirmé que son titre territorial était confirmé par des effectivités, à savoir l'exercice de prérogatives de puissance publique sur le territoire litigieux, dont l'octroi de permis de possession inscrits au cadastre costa-ricien;

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36. Considérant que, lors de son premier tour d'observations orales, le Nicaragua a soutenu que les activités que le Costa Rica lui reproche se sont déroulées sur le territoire nicaraguayen et qu'elles n'ont causé, ni ne risquent de causer, aucun préjudice irréparable à l'autre Partie;

37. Considérant que, se référant à la première sentence du général Alexander en date du 30 septembre 1897 (Nations Unies, *Recueil des sentences arbitrales (RSA)*, vol. XXVIII, p. 215-222), le Nicaragua a affirmé

on the coast originally identified as Punta Castilla, the boundary follows the eastern edge of the Harbor Head Lagoon before joining the San Juan River by the first natural channel in a south-westerly and then a southerly direction; that this boundary line in the area in dispute derives from the very terms of the Alexander Award and is more rational than the line claimed by Costa Rica, since it links, by the said channel, the bed of the San Juan River to the Harbor Head Lagoon, over which Nicaragua is indisputably sovereign; and that the exercise in various forms and over several years of sovereign prerogatives in the region in question by the Nicaraguan public authorities is confirmation of Nicaragua's title to territory;

38. Whereas Nicaragua asserted that since the said natural channel had become obstructed over the years, it had undertaken to make it once more navigable for small vessels; whereas the works condemned by Costa Rica were not therefore aimed at the cutting of an artificial canal; and whereas the cleaning and clearing of the channel had been carried out manually in Nicaraguan territory, the right bank of the said channel constituting the boundary between the two Parties;

39. Whereas Nicaragua also asserted that the number of trees felled was limited and that it has undertaken to replant the affected areas, all located on the left bank of the said channel, with ten trees for every one felled; whereas it stated that the works to clean the channel are over and finished;

40. Whereas Nicaragua indicated that the dredging operations on the San Juan River were made necessary by the progressive sedimentation of its bed and that it has not only a sovereign right to dredge the river, but also an international obligation to do so; whereas it stated that these operations, aimed at improving the navigability of the river, had only been authorized after an environmental impact assessment had been duly completed; whereas it added that, as in the case of the cleaning and clearing of the channel, any debris from the dredging of the river had been set on Nicaragua's side of the border, at various clearly identified sites;

41. Whereas Nicaragua contended that Costa Rica did not suffer, nor was it likely to suffer, any harm on account of these disputed activities; whereas it contested the scientific value of the Ramsar Report on the grounds that it was drawn up on the basis of information supplied solely by Costa Rica; whereas, according to Nicaragua, the impact of the dredging works on the San Juan River on the flow of the Colorado River is and will remain negligible, as recognized by a Costa Rican study; and whereas Nicaragua referred to a report by Dutch experts confirming the validity of the environmental impact assessment carried out by the Nicaraguan administration and the non-injurious character of the dredging works undertaken;

42. Whereas Nicaragua disputed that elements of its armed forces had occupied an area of Costa Rican territory; whereas it stated that it had assigned some of its troops to the protection of staff engaged in the cleaning of the channel and the dredging of the river, but clarified that these

que, partant du point sur la côte originellement identifié comme étant Punta Castilla, la frontière longe la côte orientale de la lagune de Harbor Head avant de rejoindre le fleuve San Juan par le premier chenal naturel en direction du sud-ouest puis du sud; que ce tracé de la frontière dans la zone litigieuse se déduit des termes mêmes de la sentence Alexander et qu'il est plus rationnel que le tracé revendiqué par le Costa Rica puisqu'il relie, par ledit chenal, le lit du fleuve San Juan à la lagune de Harbor Head, sur lesquels le Nicaragua est incontestablement souverain; et que l'exercice, sous différentes formes et depuis de nombreuses années, de prérogatives souveraines sur le territoire en cause par les autorités publiques nicaraguayennes vient confirmer le titre du Nicaragua;

38. Considérant que le Nicaragua a indiqué que, ledit chenal naturel s'étant obstrué au fil des ans, il avait entrepris de le rendre à nouveau praticable pour des embarcations légères; que les travaux dénoncés par le Costa Rica n'avaient donc aucunement pour objet le creusement d'un canal artificiel; et que le nettoyage et le débroussaillage du chenal avaient été effectués manuellement en territoire nicaraguayen, la rive droite dudit chenal constituant la frontière entre les Parties;

39. Considérant que le Nicaragua a encore fait valoir que le déboisement auquel il a procédé était d'une ampleur limitée et qu'il a entrepris de replanter les zones concernées, toutes situées sur la rive gauche dudit chenal, à raison de dix arbres pour chaque arbre abattu; qu'il a affirmé que les travaux de nettoyage du chenal sont achevés et ont pris fin;

40. Considérant que le Nicaragua a indiqué que les opérations de dragage du fleuve San Juan ont été rendues nécessaires par la sédimentation progressive de son lit et qu'elles relevaient de l'exercice de ses droits souverains, mais répondaient aussi à une obligation internationale d'y procéder; qu'il a précisé que ces opérations, visant à améliorer la navigabilité du fleuve, avaient été autorisées après qu'une évaluation de l'impact environnemental eut dûment été conduite; qu'il a ajouté que, comme dans le cas du nettoyage et du dégagement du chenal, les résidus du dragage du fleuve avaient été déversés de son côté de la frontière, sur différents sites précisément identifiés;

41. Considérant que le Nicaragua a soutenu que le Costa Rica n'a subi, ni ne risquait de subir, aucun préjudice du fait de ces activités litigieuses; qu'il a contesté la valeur scientifique du rapport Ramsar pour avoir été établi sur la base d'informations fournies par le seul Costa Rica; que, selon le Nicaragua, les travaux de dragage du fleuve San Juan n'ont et n'auront qu'un effet très limité sur le débit du fleuve Colorado, ce que reconnaîtrait une étude du Costa Rica; et que le Nicaragua excipe d'un rapport d'experts néerlandais confirmant le bien-fondé de l'évaluation de l'impact environnemental conduite par son administration et le caractère non dommageable des travaux de dragage entrepris;

42. Considérant que le Nicaragua a contesté que des éléments de ses forces armées aient occupé une partie du territoire costa-ricien; qu'il a indiqué avoir affecté certains éléments de ses forces armées à la protection du personnel engagé dans les opérations de nettoyage du chenal et de

troops had remained in Nicaraguan territory and that they were no longer present in the border region where those activities took place;

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43. Whereas, in its second round of oral observations, Costa Rica repudiated the existence of a natural channel joining the San Juan River to the Harbor Head Lagoon and maintained that the narrow waterway in question had been artificially constructed by Nicaragua in Costa Rican territory; whereas, according to Costa Rica, Nicaragua's territorial claim to the area in dispute is not "plausible" and derives from a dangerous challenge to the principle of the stability of borders; whereas Costa Rica contended that the *effectivités* invoked by Nicaragua are supported only by affidavits gathered from Nicaraguan State officials after the introduction of the present proceedings;

44. Whereas Costa Rica indicated that, in spite of its requests, it had not received, before the present proceedings, a copy of the environmental impact assessment conducted by Nicaragua; whereas it observed that this study concerned only the dredging operation on the San Juan River and not the activities relating to the canal cut by Nicaragua and considered by the latter to be a natural channel (hereinafter the "*caño*", the Spanish designation adopted by both Parties as from the second round of oral argument); and whereas Costa Rica called into question the probative value of the report of the Dutch experts submitted by Nicaragua and maintained that it has suffered environmental harm which has the potential to be aggravated, thereby rendering necessary the indication of provisional measures by the Court;

45. Whereas, at the end of its second round of oral observations, Costa Rica presented the following submissions:

"Costa Rica requests the Court to order the following provisional measures:

- A. Pending the determination of this case on the merits, Nicaragua shall not, in the area comprising the entirety of Isla Portillos, that is to say, across the right bank of the San Juan River and between the banks of the Laguna los Portillos (also known as Harbor Head Lagoon) and the Taura River ("the relevant area"):
 - (1) station any of its troops or other personnel;
 - (2) engage in the construction or enlargement of a canal;
 - (3) fell trees or remove vegetation or soil;
 - (4) dump sediment.
- B. Pending the determination of this case on the merits, Nicaragua shall suspend its ongoing dredging programme in the River San Juan adjacent to the relevant area.

dragage du fleuve, mais a affirmé que ces troupes étaient demeurées en territoire nicaraguayen et qu'elles n'étaient plus présentes dans la région frontalière où ces activités avaient eu lieu;

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43. Considérant que, lors du second tour d'observations orales, le Costa Rica a nié l'existence d'un chenal naturel reliant le fleuve San Juan à la lagune de Harbor Head et a maintenu que l'étroite voie d'eau en question avait été artificiellement creusée par le Nicaragua en territoire costaricien; que, selon le Costa Rica, la prétention territoriale du Nicaragua sur la zone litigieuse n'est pas « plausible » et procède d'une dangereuse remise en cause du principe de la stabilité des frontières; que le Costa Rica a soutenu que les effectivités mises en avant par le Nicaragua étaient seulement fondées sur des déclarations recueillies auprès de fonctionnaires nicaraguayens après l'introduction de la présente instance;

44. Considérant que le Costa Rica a indiqué qu'en dépit de ses demandes il n'avait pas reçu, avant la présente procédure, communication de l'évaluation de l'impact environnemental conduite par le Nicaragua; qu'il a souligné que cette étude ne portait que sur l'opération de dragage du fleuve San Juan et ne concernait pas les activités relatives au canal creusé par le Nicaragua et considéré par ce dernier comme étant un chenal naturel (ci-après le « caño », selon la dénomination espagnole adoptée par les deux Parties à partir du second tour des plaidoiries); et que le Costa Rica a mis en doute la valeur probante du rapport des experts néerlandais déposé par le Nicaragua et a maintenu avoir subi un préjudice environnemental qui risque de s'aggraver, et rend dès lors nécessaire l'indication de mesures conservatoires par la Cour;

45. Considérant que, au terme de son second tour de plaidoiries, le Costa Rica a présenté les conclusions suivantes:

« Le Costa Rica demande à la Cour d'ordonner les mesures conservatoires suivantes:

- A. En attendant la décision finale sur le fond, et dans la zone comprenant l'entièreté de Isla Portillos, c'est-à-dire la rive droite du fleuve San Juan et entre les rives de la lagune de los Portillos (Lagon Harbor Head) et de la rivière Taura (« la zone pertinente »), le Nicaragua doit s'abstenir de:
- 1) stationner ses troupes armées ou autres agents;
 - 2) construire ou élargir un canal;
 - 3) procéder à l'abattage d'arbres ou à l'enlèvement de végétation ou de terre;
 - 4) déverser des sédiments.
- B. En attendant la décision finale sur le fond, le Nicaragua doit suspendre son programme de dragage du fleuve San Juan dans la zone adjacente à la zone pertinente.

- C. Pending the determination of this case on the merits, Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court”;

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46. Whereas, in its second round of oral observations, Nicaragua contended that, contrary to Costa Rica’s affirmations, the *caño* existed before it was the subject of the clean-up operation; that this fact was evidenced by various maps, satellite photographs, the environmental impact assessment conducted by Nicaragua and affidavits, all of which pre-date the disputed works; and that the boundary between the Parties in the contested area does indeed follow this *caño*, in view of the specific hydrological characteristics of the region;

47. Whereas Nicaragua reaffirmed that it has the right to dredge the San Juan River without having to obtain Costa Rica’s permission to do so; whereas it confirmed that this limited operation, like that relating to the cleaning and clearing of the *caño*, had not caused any damage to Costa Rica and did not risk causing any, since, according to Nicaragua, there is no evidence to substantiate the Applicant’s claims; and whereas it concluded that there was nothing to justify the indication by the Court of the provisional measures sought by Costa Rica;

48. Whereas, at the end of its second round of oral observations, Nicaragua presented the following submissions:

“In accordance with Article 60 of the Rules of Court and having regard to the Request for the indication of provisional measures of the Republic of Costa Rica and its oral pleadings, the Republic of Nicaragua respectfully submits that,

For the reasons explained during these hearings and any other reasons the Court might deem appropriate, the Republic of Nicaragua asks the Court to dismiss the Request for provisional measures filed by the Republic of Costa Rica”;

* * *

PRIMA FACIE JURISDICTION

49. Whereas, the Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded; whereas the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards

- C. En attendant la décision finale sur le fond, le Nicaragua doit s'abstenir de toute autre action pouvant porter préjudice aux droits du Costa Rica, ou pouvant aggraver ou étendre le différend porté devant la Cour»;

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46. Considérant que, lors du second tour d'observations orales, le Nicaragua a fait valoir que, contrairement à ce que le Costa Rica a affirmé, le *caño* existait avant l'opération de nettoyage dont il avait fait l'objet; que ce fait était attesté par différentes cartes, des photos satellites, l'évaluation de l'impact environnemental conduite par le Nicaragua et des témoignages, tous ces éléments de preuve étant antérieurs aux travaux litigieux; et que la frontière entre les Parties dans la zone litigieuse passe bien par ce *caño*, compte tenu des caractéristiques hydrologiques particulières de cette région;

47. Considérant que le Nicaragua a réaffirmé avoir le droit de procéder au dragage du fleuve San Juan sans devoir attendre le consentement du Costa Rica à cette fin; qu'il a confirmé que cette opération, d'ampleur limitée, de même que celle relative au nettoyage et au dégagement du *caño* n'avaient causé aucun dommage au Costa Rica et ne risquaient pas d'engendrer, aucun élément de preuve ne venant, selon le Nicaragua, confirmer les affirmations du demandeur; et qu'il a conclu que rien ne justifiait l'indication par la Cour des mesures conservatoires sollicitées par le Costa Rica;

48. Considérant que, au terme de son second tour de plaidoiries, le Nicaragua a présenté les conclusions suivantes:

«Conformément à l'article 60 du Règlement de la Cour et vu la demande en indication de mesures conservatoires introduite par la République du Costa Rica et ses plaidoiries, la République du Nicaragua prie respectueusement la Cour,

Pour les motifs exposés à l'audience et pour tous autres motifs que la Cour pourrait retenir, de rejeter la demande en indication de mesures conservatoires introduite par la République du Costa Rica»;

* * *

COMPÉTENCE *PRIMA FACIE*

49. Considérant que la Cour ne peut indiquer des mesures conservatoires que si les dispositions invoquées par le demandeur semblent *prima facie* constituer une base sur laquelle sa compétence pourrait être fondée; que la Cour n'a pas besoin de s'assurer de manière définitive qu'elle a compétence

the merits of the case (see, for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Order of 28 May 2009*, *I.C.J. Reports 2009*, p. 147, para. 40);

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50. Whereas Costa Rica is seeking to found the jurisdiction of the Court on Article XXXI of the Pact of Bogotá and on the declarations made by the two States pursuant to Article 36, paragraph 2, of the Statute; whereas it also refers to a communication sent by the Nicaraguan Minister for Foreign Affairs to his Costa Rican counterpart dated 30 November 2010, in which the Court is presented as “the judicial organ of the United Nations competent to discern over” the questions raised by the present dispute;

51. Whereas Nicaragua, in the present proceedings, did not contest the jurisdiction of the Court to entertain the dispute;

52. Whereas, in view of the foregoing, the Court considers that the instruments invoked by Costa Rica appear, *prima facie*, to afford a basis on which the Court might have jurisdiction to rule on the merits, enabling it to indicate provisional measures if it considers that the circumstances so require; whereas, at this stage of the proceedings, the Court is not obliged to determine with greater precision which instrument or instruments invoked by Costa Rica afford a basis for its jurisdiction to entertain the various claims submitted to it (see *ibid.*, p. 151, para. 54);

* * *

PLAUSIBLE CHARACTER OF THE RIGHTS WHOSE PROTECTION
IS BEING SOUGHT AND LINK BETWEEN THESE RIGHTS
AND THE MEASURES REQUESTED

53. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties pending its decision; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong to either party; whereas, therefore, the Court may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible (*ibid.*, p. 151, paras. 56-57);

54. Whereas, moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought (see, for example, *ibid.*, p. 151, para. 56);

quant au fond de l'affaire (voir, par exemple, *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009*, p. 147, par. 40);

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50. Considérant que le Costa Rica entend fonder la compétence de la Cour sur l'article XXXI du pacte de Bogotá et sur les déclarations faites par les deux Etats en application du paragraphe 2 de l'article 36 du Statut; qu'il se réfère en outre à une communication que le ministre des affaires étrangères du Nicaragua a adressée à son homologue costaricien en date du 30 novembre 2010, dans laquelle la Cour est présentée comme «l'organe judiciaire des Nations Unies compétent pour trancher» les questions posées par le présent différend;

51. Considérant que le Nicaragua, dans la présente procédure, n'a pas contesté la compétence de la Cour pour connaître du différend;

52. Considérant qu'au vu de ce qui précède la Cour estime que les instruments invoqués par le Costa Rica semblent, *prima facie*, constituer une base sur laquelle la Cour pourrait fonder sa compétence pour se prononcer sur le fond, lui permettant, si elle estime que les circonstances l'exigent, d'indiquer des mesures conservatoires; qu'à ce stade de la procédure la Cour n'est pas tenue de déterminer avec plus de précision, parmi les instruments invoqués par le Costa Rica, lequel ou lesquels fondent sa compétence pour connaître des différentes demandes qui lui sont présentées (voir *ibid.*, p. 151, par. 54);

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CARACTÈRE PLAUSIBLE DES DROITS DONT
LA PROTECTION EST RECHERCHÉE ET LIEN ENTRE CES DROITS
ET LES MESURES DEMANDÉES

53. Considérant que le pouvoir d'indiquer des mesures conservatoires que la Cour tient de l'article 41 de son Statut a pour objet de sauvegarder le droit de chacune des parties en attendant qu'elle rende sa décision; qu'il s'ensuit que la Cour doit se préoccuper de sauvegarder par de telles mesures les droits que l'arrêt qu'elle aura ultérieurement à rendre pourrait éventuellement reconnaître à l'une ou à l'autre des parties; que, dès lors, la Cour ne peut exercer ce pouvoir que si les droits allégués par une partie apparaissent au moins plausibles (*ibid.*, p. 151, par. 56-57);

54. Considérant par ailleurs qu'un lien doit exister entre les droits qui font l'objet de l'instance pendante devant la Cour sur le fond de l'affaire et les mesures conservatoires sollicitées (voir, par exemple, *ibid.*, p. 151, par. 56);

*Plausible Character of the Rights Whose
Protection Is Being Sought*

55. Whereas the rights claimed by Costa Rica and forming the subject of the case on the merits are, on the one hand, its right to assert sovereignty over the entirety of Isla Portillos and over the Colorado River and, on the other hand, its right to protect the environment in those areas over which it is sovereign; whereas, however, Nicaragua contends that it holds the title to sovereignty over the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon (hereinafter the “disputed territory”), and whereas Nicaragua argues that its dredging of the San Juan River, over which it has sovereignty, has only a negligible impact on the flow of the Colorado River, over which Costa Rica has sovereignty;

56. Whereas, therefore, apart from any question linked to the dredging of the San Juan River and the flow of the Colorado River, the rights at issue in these proceedings derive from the sovereignty claimed by the Parties over the same territory (cf. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 22, para. 39); and whereas the part of Isla Portillos in which the activities complained of by Costa Rica took place is *ex hypothesi* an area which, at the present stage of the proceedings, is to be considered by the Court as in dispute (cf. *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 10, para. 28);

57. Whereas, at this stage of the proceedings, the Court cannot settle the Parties’ claims to sovereignty over the disputed territory and is not called upon to determine once and for all whether the rights which Costa Rica wishes to see respected exist, or whether those which Nicaragua considers itself to possess exist; whereas, for the purposes of considering the Request for the indication of provisional measures, the Court needs only to decide whether the rights claimed by the Applicant on the merits, and for which it is seeking protection, are plausible;

58. Whereas it appears to the Court, after a careful examination of the evidence and arguments presented by the Parties, that the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible; whereas the Court is not called upon to rule on the plausibility of the title to sovereignty over the disputed territory advanced by Nicaragua; whereas the provisional measures it may indicate would not prejudice any title; and whereas the Parties’ conflicting claims cannot hinder the exercise of the Court’s power under its Statute to indicate such measures;

59. Whereas paragraph 6 of the third clause of the Cleveland Award of 22 March 1888 reads as follows:

*Caractère plausible des droits
dont la protection est recherchée*

55. Considérant que les droits qui font l'objet de l'affaire au fond et que le Costa Rica revendique sont, d'une part, son droit au respect de sa souveraineté sur l'entière de Isla Portillos et sur le fleuve Colorado, et, d'autre part, son droit à protéger l'environnement sur les espaces sur lesquels il est souverain; que, toutefois, le Nicaragua soutient détenir le titre de souveraineté sur la partie septentrionale de Isla Portillos, soit la zone humide d'environ trois kilomètres carrés comprise entre la rive droite du *caño* litigieux, la rive droite du fleuve San Juan lui-même jusqu'à son embouchure dans la mer des Caraïbes et la lagune de Harbor Head (ci-après le « territoire litigieux »), et qu'il fait valoir que ses opérations de dragage du fleuve San Juan, sur lequel il a la souveraineté, n'ont qu'un impact tout à fait mineur sur le débit du fleuve Colorado, sur lequel le Costa Rica est souverain;

56. Considérant, dès lors, que, toute question liée au dragage du fleuve San Juan et au débit du fleuve Colorado mise à part, les droits en litige dans la présente instance découlent des prétentions des Parties à la souveraineté sur le même territoire (voir *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria)*, mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I), p. 22, par. 39); et que la zone de Isla Portillos où les activités incriminées par le Costa Rica ont eu lieu est par hypothèse une zone que la Cour, en la présente phase de la procédure, doit considérer comme contestée (voir *Plateau continental de la mer Egée (Grèce c. Turquie)*, mesures conservatoires, ordonnance du 11 septembre 1976, C.I.J. Recueil 1976, p. 10, par. 28);

57. Considérant que, à ce stade de la procédure, la Cour ne peut départager les prétentions des Parties à la souveraineté sur le territoire litigieux et n'a pas à établir de façon définitive l'existence des droits dont le Costa Rica revendique le respect, ni celle des droits que le Nicaragua estime siens; que, pour les besoins de l'examen de la demande en indication de mesures conservatoires, la Cour doit seulement décider si les droits revendiqués par le demandeur sur le fond, et dont il sollicite la protection, sont plausibles;

58. Considérant qu'il apparaît à la Cour, après un examen attentif des éléments de preuve et des arguments présentés par les Parties, que le titre de souveraineté revendiqué par le Costa Rica sur l'entière de Isla Portillos est plausible; que la Cour n'a pas à se prononcer sur la plausibilité du titre de souveraineté avancé par le Nicaragua sur le territoire litigieux; que les mesures conservatoires qu'elle pourrait indiquer ne préjugeraient d'aucun titre; et que les revendications contradictoires des Parties ne sauraient constituer un obstacle à l'exercice du pouvoir que la Cour tient de son Statut d'indiquer de telles mesures;

59. Considérant que le point 6 de la troisième partie de la sentence arbitrale du président Cleveland en date du 22 mars 1888 se lit comme suit:

“The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, provided such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.” (*RIAA*, Vol. XXVIII, p. 210.);

whereas Costa Rica contends that it has the right to request the suspension of the dredging operations on the San Juan River if they threaten seriously to impair navigation on the Colorado River or to damage Costa Rican territory; whereas, relying on the second sentence of paragraph 6 of the third clause of that Award, quoted above, Nicaragua argues that, if any damage results from the works to maintain and improve the San Juan River, Costa Rica can only seek indemnification, and therefore that Costa Rica, in the event of risk of harm, cannot obtain by means of provisional measures a remedy which the Award would exclude on the merits; whereas Costa Rica responds that indemnification is not the only remedy available to it; whereas at this stage of the proceedings, the Court finds that the rights claimed by Costa Rica are plausible;

*Link between the Rights Whose Protection Is Being Sought
and the Measures Requested*

60. Whereas the first provisional measure requested by Costa Rica is aimed at ensuring that Nicaragua will refrain from any activity “in the area comprising the entirety of Isla Portillos”; whereas the continuation or resumption of the disputed activities by Nicaragua on Isla Portillos would be likely to affect the rights of sovereignty which might be adjudged on the merits to belong to Costa Rica; whereas, therefore, a link exists between these rights and the provisional measure being sought;

61. Whereas the second provisional measure requested by Costa Rica concerns the suspension of Nicaragua’s “dredging programme in the River San Juan adjacent to the relevant area”; whereas there is a risk that the rights which might be adjudged on the merits to belong to Costa Rica would be affected if it were established that the continuation of the Nicaraguan dredging operations on the San Juan River threatened seriously to impair navigation on the Colorado River (see paragraph 59 above) or to cause damage to Costa Rica’s territory; whereas, therefore, there exists a link between these rights and the provisional measure being sought;

«La République du Costa Rica ne peut empêcher la République du Nicaragua d'exécuter à ses propres frais et sur son propre territoire de tels travaux d'amélioration, à condition que le territoire du Costa Rica ne soit pas occupé, inondé ou endommagé en conséquence de ces travaux et que ceux-ci n'arrêtent pas ou ne perturbent pas gravement la navigation sur ledit fleuve ou sur l'un quelconque de ses affluents en aucun endroit où le Costa Rica a le droit de naviguer. La République du Costa Rica aura le droit d'être indemnisée si des parties de la rive droite du fleuve San Juan qui lui appartiennent sont occupées sans son consentement ou si des terres situées sur cette même rive sont inondées ou endommagées de quelque manière que ce soit en conséquence de travaux d'amélioration.» (RSA, vol. XXVIII, p. 210.);

que le Costa Rica soutient avoir le droit de demander la suspension des opérations de dragage du fleuve San Juan si celles-ci risquent de perturber gravement la navigation sur le fleuve Colorado ou de porter préjudice à son territoire; que, s'appuyant sur la deuxième phrase du paragraphe 6 de la troisième partie de ladite sentence, citée ci-dessus, le Nicaragua fait valoir que, en cas de dommages résultant des travaux d'entretien et d'amélioration du fleuve San Juan, le Costa Rica peut seulement en demander l'indemnisation, et que celui-ci ne saurait donc obtenir par la voie de mesures conservatoires, en cas de risque de préjudice, un remède que ladite sentence exclurait au fond; et que le Costa Rica répond que l'indemnisation n'est pas le seul remède à sa disposition; considérant que, à ce stade de la procédure, la Cour estime que les droits revendiqués par le Costa Rica sont plausibles;

*Lien entre les droits dont la protection est recherchée
et les mesures demandées*

60. Considérant que la première mesure conservatoire demandée par le Costa Rica tend à garantir que le Nicaragua s'abstiendra de toute activité «dans la zone comprenant l'entièreté de Isla Portillos»; que la poursuite ou la reprise des activités litigieuses du Nicaragua sur Isla Portillos seraient susceptibles d'affecter les droits de souveraineté que le Costa Rica pourrait se voir reconnaître au fond; que, dès lors, un lien existe entre ces droits et la mesure conservatoire sollicitée;

61. Considérant que la deuxième mesure conservatoire demandée par le Costa Rica concerne la suspension du programme nicaraguayen «de dragage du fleuve San Juan dans la zone adjacente à la zone pertinente»; que les droits que le Costa Rica pourrait se voir reconnaître au fond risqueraient d'être atteints s'il était établi que la poursuite des opérations nicaraguayennes de dragage du fleuve San Juan risquait de gravement perturber la navigation sur le fleuve Colorado (voir paragraphe 59 ci-dessus) ou de causer des dommages au territoire du Costa Rica; que ainsi, il existe un lien entre ces droits et la mesure conservatoire sollicitée;

62. Whereas the final provisional measure sought by Costa Rica is aimed at ensuring that Nicaragua refrains “from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court” pending the “determination of this case on the merits”; whereas on a number of occasions the Court has already indicated provisional measures ordering one or other of the parties, or even both, to refrain from any action which would aggravate or extend the dispute or make it more difficult to resolve (see, for example, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *Provisional Measures, Order of 15 December 1979*, *I.C.J. Reports 1979*, p. 21, para. 47, point B; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, *I.C.J. Reports 1993*, p. 24, para. 52, point B; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Provisional Measures, Order of 15 March 1996*, *I.C.J. Reports 1996 (I)*, p. 24, para. 49, point 1); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Provisional Measures, Order of 1 July 2000*, *I.C.J. Reports 2000*, p. 129, para. 47, point (1)); whereas “in those cases provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures, Order of 23 January 2007*, *I.C.J. Reports 2007 (I)*, p. 16, para. 49); whereas the final provisional measure sought by Costa Rica, being very broadly worded, is linked to the rights which form the subject of the case before the Court on the merits, in so far as it is a measure complementing more specific measures protecting those same rights;

* * *

RISK OF IRREPARABLE PREJUDICE AND URGENCY

63. Whereas the Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of the judicial proceedings (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993*, *I.C.J. Reports 1993*, p. 19, para. 34);

64. Whereas the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision (see, for example,

62. Considérant que la dernière mesure conservatoire sollicitée par le Costa Rica tend à garantir que le Nicaragua s'abstienne «de toute autre action pouvant porter préjudice aux droits du Costa Rica, ou pouvant aggraver ou étendre le différend porté devant la Cour» jusqu'à la «décision finale sur le fond»; que la Cour a déjà indiqué à plusieurs reprises des mesures conservatoires ordonnant à l'une ou l'autre des parties, voire aux deux, de s'abstenir de tous actes de nature à aggraver ou étendre le différend ou à en rendre la solution plus difficile (voir, par exemple, *Personnel diplomatique et consulaire des Etats-Unis à Téhéran, mesures conservatoires, ordonnance du 15 décembre 1979, C.I.J. Recueil 1979*, p. 21, par. 47, point B; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993*, p. 24, par. 52, point B; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I)*, p. 24, par. 49, point 1; *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), mesures conservatoires, ordonnance du 1^{er} juillet 2000, C.I.J. Recueil 2000*, p. 129, par. 47, point 1); que, «dans ces affaires, des mesures conservatoires autres que celles ordonnant aux parties de s'abstenir de tous actes de nature à aggraver ou étendre le différend ou à en rendre la solution plus difficile ont été également indiquées» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 23 janvier 2007, C.I.J. Recueil 2007 (I)*, p. 16, par. 49); que, étant formulée en des termes très larges, la dernière mesure conservatoire sollicitée par le Costa Rica présente un lien avec les droits qui font l'objet de l'instance pendante devant la Cour sur le fond en ce qu'elle vient en complément de mesures plus spécifiques de protection de ces mêmes droits;

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RISQUE DE PRÉJUDICE IRRÉPARABLE ET URGENCE

63. Considérant que la Cour tient de l'article 41 de son Statut le pouvoir d'indiquer des mesures conservatoires lorsqu'un préjudice irréparable risque d'être causé aux droits en litige dans une procédure judiciaire (voir, par exemple, *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993*, p. 19, par. 34);

64. Considérant que le pouvoir de la Cour d'indiquer des mesures conservatoires ne sera exercé que s'il y a urgence, c'est-à-dire s'il existe un risque réel et imminent qu'un préjudice irréparable soit causé aux droits en litige avant que la Cour n'ait rendu sa décision définitive (voir, par

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, pp. 152-153, para. 62); and whereas the Court must therefore consider whether such a risk exists in these proceedings;

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65. Whereas, in its Request for the indication of provisional measures, Costa Rica states that “Nicaraguan armed forces continue to be present on Isla Portillos in breach of Costa Rica’s sovereign rights” and that Nicaragua “is continuing to damage the territory of Costa Rica, posing a serious threat to its internationally protected wetlands and forests”; whereas it contends, moreover, that

“Nicaragua[, which] is attempting to unilaterally adjust, to its own benefit, a River the right bank of which forms a valid, lawful and agreed border . . . cannot be permitted to continue to deviate the San Juan River through Costa Rica’s territory in this manner, so as to impose on Costa Rica and the Court a *fait accompli*”;

66. Whereas, during the course of the oral proceedings, Costa Rica stated that it wished the *status quo ante* to be restored, pending the Court’s judgment on the merits, and indicated that the following rights, which it considers itself to possess, are under threat of irreparable prejudice as a result of Nicaragua’s activities:

- “1. the right to sovereignty and territorial integrity;
2. the right not to have its territory occupied;
3. the right not to have its trees chopped down by a foreign force;
4. the right not to have its territory used for depositing dredging sediment or as the site for the unauthorized digging of a canal; and
5. the several rights corresponding to Nicaragua’s obligation not to dredge the San Juan if this affects or damages Costa Rica’s land, environment or the integrity and flow of the Colorado River”;

67. Whereas Costa Rica maintained that it “does not, at the present stage, need to establish that its rights have actually been harmed irreparably” nor to “prove actual harm”, and that it is sufficient to establish “that there is a risk of irreparable prejudice [being caused] to the rights in dispute, and that the risk of such harm is sufficiently serious and imminent that provisional measures are required to protect the rights”;

68. Whereas Costa Rica asserted that the works undertaken by Nicaragua at the site of the *caño*, in particular the felling of trees, the clearing of vegetation, the removal of soil and the diversion of the waters of the San Juan River, not only entail a violation of Costa Rica’s territorial

exemple, *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009, p. 152-153, par. 62*); et que la Cour doit donc examiner si, dans la présente instance, un tel risque existe;

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65. Considérant que, dans sa demande en indication de mesures conservatoires, le Costa Rica fait valoir que les «forces armées nicaraguayennes continuent d'être présentes sur l'île de Portillos, en violation des droits souverains du Costa Rica» et que le Nicaragua «continue de causer des dommages au territoire costa-ricien, faisant peser une grave menace sur les zones humides et forêts de ce territoire qui jouissent d'une protection internationale»; qu'il soutient, de surcroît, que

«le Nicaragua[, qui] tente de modifier unilatéralement, à son profit, le cours d'un fleuve dont la rive droite constitue une frontière convenue, valide et licite..., ne saurait être autorisé à continuer de faire dévier ainsi le San Juan en territoire costa-ricien, en vue de mettre le Costa Rica et la Cour devant un fait accompli»;

66. Considérant que, au cours de la procédure orale, le Costa Rica a indiqué qu'il souhaitait, en attendant l'arrêt de la Cour sur le fond, le rétablissement du *statu quo ante* et a souligné que les droits suivants, qu'il estime être les siens, sont menacés de préjudice irréparable du fait des activités du Nicaragua:

- «1) le droit à la souveraineté et à l'intégrité territoriale;
- 2) le droit à la non-occupation;
- 3) le droit à ce que son territoire ne soit pas déboisé par une force étrangère;
- 4) le droit à ce que son territoire ne soit pas utilisé pour le déversement de sédiments provenant d'un dragage ou le creusement non autorisé d'un canal;
- 5) les différents droits correspondant à l'obligation qui incombe au Nicaragua de ne pas draguer le San Juan si cela affecte ou endommage le territoire du Costa Rica, son environnement ou l'intégrité et le débit du Colorado»;

67. Considérant que le Costa Rica a fait valoir qu'il «n'a pas, à ce stade, besoin d'établir que ses droits ont réellement subi un préjudice irréparable», ni «l'existence d'un réel dommage», mais qu'il lui suffit d'établir «que le risque existe qu'un préjudice irréparable [soit causé] aux droits en litige et qu'il est suffisamment grave et imminent pour que l'indication de mesures conservatoires soit nécessaire»;

68. Considérant que le Costa Rica a affirmé que les travaux entrepris par le Nicaragua dans la zone du *caño*, en particulier l'abattage d'arbres, l'arrachage de végétation, l'extraction de terre et la déviation des eaux du fleuve San Juan, en plus de procéder d'une violation de l'intégrité territo-

integrity, but will have the effect of causing flooding and damage to Costa Rican territory, as well as geomorphological changes; whereas, according to Costa Rica, the dredging of the San Juan River carried out by Nicaragua will result in similar effects, as well as significantly reducing the flow of the Colorado River; and whereas it contended that the harm caused will not merely be irreparable as such, but that it is Nicaragua's intention for it to be irreparable, because it is not doing this for temporary purposes;

69. Whereas, moreover, Costa Rica affirms in its Request for the indication of provisional measures that the request "is of . . . real urgency", because of "the continued damage being inflicted on [its] territory" by Nicaragua's activities, in particular its repeated dredging of the San Juan River; whereas, according to Costa Rica, "[t]here is a real risk that . . . action prejudicial to the rights of Costa Rica will continue and may significantly alter the factual situation on the ground before the Court has the opportunity to render its final decision on the questions for determination set out in the Application"; whereas it adds that "[t]he ongoing presence of Nicaraguan armed forces on Costa Rica's territory is contributing to a political situation of extreme hostility and tension" and that "[a] provisional measure ordering the withdrawal of Nicaraguan forces from Costa Rican territory is . . . justified so as to prevent the aggravation and/or extension of the dispute"; and whereas, in the oral proceedings, Costa Rica reaffirmed the urgent nature of its request;

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70. Whereas, during the oral proceedings, Nicaragua contended that it acted within its own territory and caused no harm to Costa Rica; whereas it maintained that its activities, the environmental impact of which had been duly assessed beforehand, were not likely to cause or aggravate the damage feared by Costa Rica and that, in any case, the risk of harm was not imminent;

71. Whereas Nicaragua asserted at the hearings that the cleaning and clearing operations in respect of the *caño* were over and finished, and that none of its armed forces were presently stationed on Isla Portillos; whereas, in a written reply to questions put by a Member of the Court at the end of the hearings, Nicaragua confirmed these assertions, adding that it did "not intend to send any troops or other personnel to the region" contested by the Parties nor to "[establish] a military post there in the future", while the issue of the felling of trees and the dumping of sediment in certain areas along the *caño* "no longer arises", since the operation to clean the latter is "over and finished";

72. Whereas Nicaragua stated in its written replies that it does not "intend to have any personnel stationed in [the disputed] area"; whereas it nevertheless added that "[t]he only operation currently being carried out there is the replanting of trees" and that "[t]he Ministry of the Environment of Nicaragua (MARENA) will send inspectors to the site periodi-

riale du Costa Rica, auront pour effet de provoquer des inondations et des dégâts sur le territoire costa-ricien, ainsi que des modifications géomorphologiques; que, selon le Costa Rica, le dragage du fleuve San Juan entrepris par le Nicaragua emportera des effets comparables, en plus de réduire significativement le débit du fleuve Colorado; et qu'il a soutenu que ces préjudices ne seront pas seulement irréparables en tant que tels, mais que le Nicaragua entend bien qu'il en soit ainsi, car les objectifs poursuivis par cet État ne sont pas temporaires;

69. Considérant en outre que le Costa Rica soutient dans sa demande en indication de mesures conservatoires que celle-ci «revêt un réel caractère d'urgence» car des dommages «continuent d'être causés [à son] territoire» par les activités du Nicaragua, notamment par la poursuite du dragage du fleuve San Juan; que, selon le Costa Rica, «le risque est réel de voir se poursuivre des actes préjudiciables [à ses] droits..., qui pourraient sensiblement modifier la situation sur le terrain avant que la Cour n'ait eu l'occasion de rendre sa décision définitive sur les questions qui lui sont soumises dans la requête»; qu'il ajoute que «[l]e maintien de la présence de forces armées nicaraguayennes sur le territoire du Costa Rica contribue à créer une situation politique marquée par une hostilité et une tension extrêmes» et qu'«une mesure conservatoire prescrivant le retrait des forces nicaraguayennes du territoire costa-ricien est justifiée afin d'empêcher que le différend ne s'aggrave ou ne s'étende»; et que, lors de la procédure orale, le Costa Rica a réaffirmé le caractère urgent de sa demande;

*

70. Considérant qu'au cours de la procédure orale le Nicaragua a soutenu avoir agi sur son territoire et n'avoir causé aucun dommage au Costa Rica; qu'il a souligné que ses activités, dont l'impact environnemental avait dûment et préalablement été étudié, n'étaient pas susceptibles de causer ou d'aggraver les préjudices craints par le Costa Rica et que, en toute hypothèse, aucun de ceux-ci n'était imminent;

71. Considérant que le Nicaragua a affirmé à l'audience que les opérations de nettoyage et de dégagement du *caño* étaient achevées et avaient pris fin, et qu'aucun élément de ses forces armées n'était stationné sur Isla Portillos; que, répondant par écrit à des questions posées par un juge à la fin des audiences, le Nicaragua a confirmé ces dires, ajoutant qu'il n'avait «nullement l'intention d'envoyer des troupes ou d'autres agents dans la région» contestée entre les Parties ni «d'y établir de poste militaire à l'avenir», tandis que la question de l'abattage d'arbres ou du dépôt de sédiments dans certaines zones le long du *caño* «ne se pose plus» dès lors que l'opération de nettoyage de ce dernier «est termin[e]»;

72. Considérant que le Nicaragua a indiqué, dans ses réponses écrites, qu'il n'avait pas «l'intention de faire stationner des agents dans [la] zone» litigieuse; qu'il a néanmoins ajouté que «la seule opération qui ... [y était en cours était] la replantation d'arbres» et que «[l]e ministère de l'environnement du Nicaragua (MARENA) enverra[it] périodiquement des ins-

cally in order to monitor the reforestation process and any changes which might occur in the region, including the Harbor Head Lagoon”; whereas Nicaragua also observed that “[t]he *caño* is no longer obstructed” and further stated that “[i]t is possible to patrol the area on the river, as has always been the case, for the purposes of enforcing the law, combating drug trafficking and organized crime, and protecting the environment”;

*

73. Whereas it is in the light of this information that the first provisional measure requested by Costa Rica in its submissions presented at the end of its second round of oral observations should be considered, namely, that

“[p]ending the determination of this case on the merits, Nicaragua shall not, in the area comprising the entirety of Isla Portillos, that is to say, across the right bank of the San Juan River and between the banks of the Laguna los Portillos (also known as Harbor Head Lagoon) and the Taura River (‘the relevant area’):

- (1) station any of its troops or other personnel;
- (2) engage in the construction or enlargement of a canal;
- (3) fell trees or remove vegetation or soil;
- (4) dump sediment”;

74. Whereas Nicaragua’s written responses set out above (see paragraph 71) indicate that the work in the area of the *caño* has come to an end; whereas the Court takes note of that; whereas the Court therefore concludes that, in the circumstances of the case as they now stand, there is no need to indicate the measures numbered (2), (3) and (4) as set out in paragraph 73 above;

75. Whereas those written responses nevertheless also show that Nicaragua, while stating that “[t]here are no Nicaraguan troops currently stationed in the area in question” and that “Nicaragua does not intend to send any troops or other personnel to the region” (see paragraph 71 above), does intend to carry out certain activities, if only occasionally, in the disputed territory, including on the *caño* (see paragraph 72 above); whereas the Court recalls that there are competing claims over the disputed territory; whereas this situation creates an imminent risk of irreparable prejudice to Costa Rica’s claimed title to sovereignty over the said territory and to the rights deriving therefrom; whereas this situation moreover gives rise to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death;

76. Whereas the Court concludes under these circumstances that provisional measures should be indicated; whereas it points out that it has the

pecteurs sur place afin de surveiller le processus de reboisement, ainsi que les changements qui pourraient se produire dans la région, y compris la lagune de Harbor Head»; que le Nicaragua a encore précisé que «[l]e caño n'[était] plus obstrué» et qu'il a déclaré en outre qu'«[i]l [était] possible de patrouiller dans la zone des eaux du fleuve comme cela a[vait] toujours été le cas, afin de faire respecter la loi, de lutter contre le trafic de drogue et le crime organisé et pour la protection de l'environnement»;

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73. Considérant que c'est à la lumière de ces précisions qu'il y a lieu d'examiner la première mesure conservatoire demandée par le Costa Rica dans ses conclusions présentées au terme de son second tour d'observations orales, à savoir que,

«[e]n attendant la décision finale sur le fond, et dans la zone comprenant l'entièreté de Isla Portillos, c'est-à-dire la rive droite du fleuve San Juan et entre les rives de la lagune de los Portillos (Lagon Harbor Head) et de la rivière Taura («la zone pertinente»), le Nicaragua doit s'abstenir de:

- 1) stationner ses troupes armées ou autres agents;
- 2) construire ou élargir un canal;
- 3) procéder à l'abattage d'arbres ou à l'enlèvement de végétation ou de terre;
- 4) déverser des sédiments»;

74. Considérant qu'il ressort des réponses écrites du Nicaragua rapportées ci-dessus (voir paragraphe 71) que les travaux dans la zone du caño ont pris fin; que la Cour en prend note; et qu'elle conclut dès lors qu'il n'y a pas lieu, dans les circonstances actuelles de l'espèce, d'indiquer les mesures 2), 3) et 4) énoncées au paragraphe 73 ci-dessus;

75. Considérant néanmoins qu'il ressort aussi desdites réponses écrites que, même si le Nicaragua a indiqué qu'«[a]ucune troupe nicaraguayenne ne stationn[ait] actuellement dans la zone en question» et qu'il «n'avait nullement l'intention d'envoyer des troupes ou d'autres agents dans la région» (voir paragraphe 71 ci-dessus), il entend, fût-ce ponctuellement, mener certaines activités sur le territoire litigieux, y compris sur le caño (voir paragraphe 72 ci-dessus); que la Cour rappelle que le territoire litigieux fait l'objet de prétentions concurrentes; que cette situation crée un risque imminent de préjudice irréparable au titre de souveraineté revendiqué par le Costa Rica sur ledit territoire ainsi qu'aux droits qui en découlent; considérant de surcroît que cette situation fait naître un risque réel et actuel d'incidents susceptibles d'entraîner une atteinte irrémédiable à l'intégrité physique de personnes ou à leur vie;

76. Considérant que la Cour conclut que, dans ces circonstances, il y a lieu d'indiquer des mesures conservatoires; qu'elle rappelle tenir de son Sta-

power under its Statute to indicate provisional measures that are in whole or in part other than those requested, or measures that are addressed to the party which has itself made the request, as Article 75, paragraph 2, of the Rules of Court expressly states (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures*, *Order of 8 April 1993*, *I.C.J. Reports 1993*, p. 22, para. 46);

77. Whereas, given the nature of the disputed territory, the Court considers that, subject to the provisions in paragraph 80 below, each Party must refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security, until such time as the Court has decided the dispute on the merits or the Parties have come to an agreement on this subject;

78. Whereas, in order to prevent the development of criminal activity in the disputed territory in the absence of any police or security forces of either Party, each Party has the responsibility to monitor that territory from the territory over which it unquestionably holds sovereignty, i.e., in Costa Rica's case, the part of Isla Portillos lying east of the right bank of the *caño*, excluding the *caño*; and, in Nicaragua's case, the San Juan River and Harbor Head Lagoon, excluding the *caño*; and whereas it shall be for the Parties' police or security forces to co-operate with each other in a spirit of good neighbourliness, in particular to combat any criminal activity which may develop in the disputed territory;

79. Whereas the Court observes that there are two wetlands of international importance, within the meaning of the Ramsar Convention, in the boundary area in question; whereas, acting pursuant to Article 2 of that Convention, Costa Rica has "designate[d]" the "Humedal Caribe Nor-este" wetland "for inclusion in [the] List of Wetlands of International Importance . . . maintained by the [continuing] bureau" established by the Convention, and whereas Nicaragua has done likewise in respect of the "Refugio de Vida Silvestre Río San Juan" wetland, of which Harbor Head Lagoon is part; whereas the Court reminds the Parties that, under Article 5 of the Ramsar Convention:

"[t]he Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna";

80. Whereas the disputed territory is moreover situated in the "Humedal Caribe Noreste" wetland, in respect of which Costa Rica bears obligations under the Ramsar Convention; whereas the Court considers that, pending delivery of the Judgment on the merits, Costa Rica must be

tut le pouvoir d'indiquer des mesures totalement ou partiellement différentes de celles sollicitées, ou des mesures qui s'adressent à la partie même dont émane la demande, ce que le paragraphe 2 de l'article 75 du Règlement mentionne expressément (voir, par exemple, *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro))*, mesures conservatoires, ordonnance du 8 avril 1993, *C.I.J. Recueil 1993*, p. 22, par. 46);

77. Considérant que, compte tenu de la nature du territoire litigieux, la Cour estime que, sous réserve de ce qui sera précisé au paragraphe 80 ci-après, chaque Partie doit s'abstenir d'envoyer ou de maintenir sur le territoire litigieux, y compris le *caño*, des agents, qu'ils soient civils, de police ou de sécurité, aussi longtemps que la Cour n'aura pas tranché le différend sur le fond ou que les Parties ne se seront pas entendues à cet égard;

78. Considérant que, afin d'éviter que des activités criminelles ne se développent sur le territoire litigieux en l'absence de forces de police ou de sécurité de l'une ou l'autre Partie, chacune des Parties a la responsabilité de le surveiller à partir des territoires sur lesquels elles sont respectivement et incontestablement souveraines, à savoir, s'agissant du Costa Rica, la partie de Isla Portillos située à l'est de la rive droite du *caño*, à l'exclusion de celui-ci, et, s'agissant du Nicaragua, le fleuve San Juan et la lagune de Harbor Head, à l'exclusion du *caño*; et qu'il appartient aux forces de police ou de sécurité des Parties de coopérer entre elles dans un esprit de bon voisinage, notamment afin de lutter contre la criminalité qui pourrait se développer sur le territoire litigieux;

79. Considérant que la Cour constate que, dans la région frontalière en cause, il existe deux zones humides d'importance internationale au sens de la convention de Ramsar; que, en application de l'article 2 de cette convention, le Costa Rica a «désign[é]» la zone humide «Humedal Caribe Noreste» aux fins de l'«inclure dans la Liste des zones humides d'importance internationale ... tenue par le bureau» permanent de la dite convention, et que le Nicaragua a fait de même au sujet de la zone humide «Refugio de Vida Silvestre Río San Juan», dont fait partie la lagune de Harbor Head; que la Cour rappelle aux Parties que, en vertu de l'article 5 de la convention de Ramsar,

«[I]es Parties contractantes se consultent sur l'exécution des obligations découlant de la convention, particulièrement dans le cas d'une zone humide s'étendant sur les territoires de plus d'une Partie contractante ou lorsqu'un bassin hydrographique est partagé entre plusieurs Parties contractantes. Elles s'efforcent en même temps de coordonner et de soutenir leurs politiques et réglementations présentes et futures relatives à la conservation des zones humides, de leur flore et de leur faune»;

80. Considérant par ailleurs que le territoire litigieux est situé dans la zone humide «Humedal Caribe Noreste» par rapport à laquelle le Costa Rica a des obligations au titre de la convention de Ramsar; que la Cour considère que, en attendant l'arrêt sur le fond, le Costa Rica doit être en

in a position to avoid irreparable prejudice being caused to the part of that wetland where that territory is situated; whereas for that purpose Costa Rica must be able to dispatch civilian personnel charged with the protection of the environment to the said territory, including the *caño*, but only in so far as it is necessary to ensure that no such prejudice be caused; and whereas Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;

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81. Whereas the second provisional measure requested by Costa Rica in its submissions presented at the conclusion of the hearings is an order requiring Nicaragua to “suspend its ongoing dredging programme in the River San Juan adjacent to the relevant area”; whereas in support of this request Costa Rica asserts that the programme creates an imminent risk of irreparable prejudice to its environment, in particular to the flow, and hence navigability, of the Colorado River, as well as to the hydrodynamic balance of the area’s waterways, which Nicaragua disputes;

82. Whereas it cannot be concluded at this stage from the evidence adduced by the Parties that the dredging of the San Juan River is creating a risk of irreparable prejudice to Costa Rica’s environment or to the flow of the Colorado River; whereas nor has it been shown that, even if there were such a risk of prejudice to rights Costa Rica claims in the present case, the risk would be imminent; and whereas the Court concludes from the foregoing that in the circumstances of the case as they now stand the second provisional measure requested by Costa Rica should not be indicated;

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83. Whereas, in the light of what the Court has already said on the subject of the final provisional measure requested by Costa Rica (see paragraph 62 above) and of the Court’s conclusions above on the subject of the specific provisional measures to be indicated, it is in addition appropriate in the circumstances to indicate complementary measures, calling on both Parties to refrain from any act which may aggravate or extend the dispute or render it more difficult of solution;

* * *

84. Whereas the Court’s “orders on provisional measures under Article 41 [of the Statute] have binding effect” (*LaGrand (Germany v. United*

mesure d'éviter qu'un préjudice irréparable ne soit causé à la partie de cette zone humide où ce territoire est situé; qu'à cette fin le Costa Rica doit pouvoir envoyer sur ledit territoire, y compris le *caño*, des agents civils chargés de la protection de l'environnement dans la stricte mesure où un tel envoi serait nécessaire pour éviter la survenance d'un tel préjudice; et que le Costa Rica devra consulter le Secrétariat de la convention de Ramsar au sujet de ces activités, informer préalablement le Nicaragua de celles-ci et faire de son mieux pour rechercher avec ce dernier des solutions communes à cet égard;

*

81. Considérant que la deuxième mesure conservatoire demandée par le Costa Rica dans ses conclusions présentées à la fin des audiences consiste à ordonner au Nicaragua de «suspendre son programme de dragage du fleuve San Juan dans la zone adjacente à la zone pertinente»; que, à l'appui de cette demande, le Costa Rica affirme que ce programme crée un risque imminent de préjudice irréparable à son environnement, singulièrement au débit du fleuve Colorado et, en conséquence, à la navigabilité de ce fleuve, ainsi qu'à l'équilibre hydrodynamique des voies d'eau de la région, ce que le Nicaragua conteste;

82. Considérant que les éléments de preuve produits par les Parties ne permettent pas de conclure à ce stade que les opérations de dragage du fleuve San Juan font peser sur l'environnement du Costa Rica ou sur le débit du fleuve Colorado un risque de préjudice irréparable; qu'il n'a pas été davantage démontré que, quand bien même il existerait un tel risque de préjudice aux droits allégués par le Costa Rica en l'espèce, celui-ci serait imminent; et que la Cour conclut de ce qui précède qu'il n'y a pas lieu, dans les circonstances actuelles de l'espèce, d'indiquer la deuxième mesure conservatoire demandée par le Costa Rica;

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83. Considérant que, compte tenu de ce que la Cour a déjà observé au sujet de la dernière mesure conservatoire demandée par le Costa Rica (voir paragraphe 62 ci-dessus) et des conclusions auxquelles elle est parvenue ci-dessus au sujet des mesures conservatoires spécifiques à indiquer, il y a lieu, eu égard aux circonstances, d'indiquer en outre, à charge des deux Parties, des mesures complémentaires tendant à ce qu'elles s'abstiennent de tout acte de nature à aggraver ou étendre le différend ou à en rendre la solution plus difficile;

* * *

84. Considérant que les ordonnances de la Cour «indiquant des mesures conservatoires au titre de l'article 41 [du Statut] ont un caractère

States of America), *Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations which both Parties are required to comply with (see, for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment, I.C.J. Reports 2005*, p. 258, para. 263));

* * *

85. Whereas the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves; and whereas it leaves unaffected the right of the Governments of Costa Rica and Nicaragua to submit arguments in respect of those questions;

* * *

86. For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) Unanimously,

Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security;

(2) By thirteen votes to four,

Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Cañado Trindade, Yusuf, Greenwood, Donoghue; *Judge ad hoc* Dugard;

AGAINST: *Judges* Sepúlveda-Amor, Skotnikov, Xue; *Judge ad hoc* Guillaume;

(3) Unanimously,

Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

obligatoire» (*LaGrand (Allemagne c. Etats-Unis d'Amérique)*, arrêt, C.I.J. Recueil 2001, p. 506, par. 109) et créent donc des obligations juridiques internationales que les deux Parties sont tenues de respecter (voir, par exemple, *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, arrêt, C.I.J. Recueil 2005, p. 258, par. 263);

* * *

85. Considérant que la décision rendue en la présente procédure ne préjuge en rien la question de la compétence de la Cour pour connaître du fond de l'affaire, ni aucune question relative à la recevabilité de la requête ou au fond lui-même, et qu'elle laisse intact le droit des Gouvernements du Costa Rica et du Nicaragua de faire valoir leurs moyens en ces matières;

* * *

86. Par ces motifs,

LA COUR,

Indique à titre provisoire les mesures conservatoires suivantes :

1) A l'unanimité,

Chaque Partie s'abstiendra d'envoyer ou de maintenir sur le territoire litigieux, y compris le *caño*, des agents, qu'ils soient civils, de police ou de sécurité;

2) Par treize voix contre quatre,

Nonobstant le point 1 ci-dessus, le Costa Rica pourra envoyer sur le territoire litigieux, y compris le *caño*, des agents civils chargés de la protection de l'environnement dans la stricte mesure où un tel envoi serait nécessaire pour éviter qu'un préjudice irréparable ne soit causé à la partie de la zone humide où ce territoire est situé; le Costa Rica devra consulter le Secrétariat de la convention de Ramsar au sujet de ces activités, informer préalablement le Nicaragua de celles-ci et faire de son mieux pour rechercher avec ce dernier des solutions communes à cet égard;

POUR: M. Owada, *président*; M. Tomka, *vice-président*; MM. Koroma, Al-Khasawneh, Simma, Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood, M^{me} Donoghue, *juges*; M. Dugard, *juge ad hoc*;

CONTRE: MM. Sepúlveda-Amor, Skotnikov, M^{me} Xue, *juges*; M. Guillaume, *juge ad hoc*;

3) A l'unanimité,

Chaque Partie s'abstiendra de tout acte qui risquerait d'aggraver ou d'étendre le différend dont la Cour est saisie ou d'en rendre la solution plus difficile;

(4) Unanimously,

Each Party shall inform the Court as to its compliance with the above provisional measures.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of March, two thousand and eleven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges KOROMA and SEPÚLVEDA-AMOR append separate opinions to the Order of the Court; Judges SKOTNIKOV, GREENWOOD and XUE append declarations to the Order of the Court; Judge *ad hoc* GULLAUME appends a declaration to the Order of the Court; Judge *ad hoc* DUGARD appends a separate opinion to the Order of the Court.

(Initialed) H.O.

(Initialed) Ph.C.

4) A l'unanimité,

Chaque Partie informera la Cour de la manière dont elle assure l'exécution des mesures conservatoires ci-dessus indiquées.

Fait en anglais et en français, le texte anglais faisant foi, au Palais de la Paix, à La Haye, le huit mars deux mille onze, en trois exemplaires, dont l'un restera déposé aux archives de la Cour et les autres seront transmis respectivement au Gouvernement de la République du Costa Rica et au Gouvernement de la République du Nicaragua.

Le président,

(Signé) Hisashi OWADA.

Le greffier,

(Signé) Philippe COUVREUR.

MM. les juges KOROMA et SEPÚLVEDA-AMOR joignent à l'ordonnance les exposés de leur opinion individuelle; MM. les juges SKOTNIKOV, GREENWOOD et M^{me} la juge XUE joignent des déclarations à l'ordonnance; M. le juge *ad hoc* GUILLAUME joint une déclaration à l'ordonnance; M. le juge *ad hoc* DUGARD joint à l'ordonnance l'exposé de son opinion individuelle.

(Paraphé) H.O.

(Paraphé) Ph.C.

PERMANENT COURT OF INTERNATIONAL JUSTICE
Judicial Year 1939

The Electricity Company of Sofia and Bulgaria (Preliminary Objection)

Belgium v. Bulgaria
Judgment

BEFORE: President: Guerrero
Vice-
President: Sir Cecil Hurst
Judges: Count Rostworowski, Fromageot, Altamira, Anzilotti, Urrutia, Jhr. van
Eysinga, Nagaoka, Cheng, Hudson, De Visscher, Erich,
Judge(s) ad hoc: Papazoff

Represented
By: Belgium: M. J. G. de Ruelle, as Agent
Bulgaria: M. Ivan Altinoff, as Agent

Perm. Link: http://www.worldcourts.com/pcij/eng/decisions/1939.04.04_electricity1.htm

Citation: Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B)
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[Translation]

[p65] The Court,
composed as above,
delivers the following judgment:

[1] By an Application filed with the Registry of the Court on January 26th, 1938, under Article 40 of the Statute of the Court, the Belgian Government instituted proceedings before the Court against the Bulgarian Government.

[2] In submitting the case to the Court the Applicant relied upon:

- (1) the declarations of Belgium and Bulgaria recognizing the jurisdiction of the Court as compulsory, declarations which were respectively ratified on March 10th, 1926, and August 12th, 1921;
- (2) the Treaty of conciliation, arbitration and judicial settlement concluded between the two countries on June 23rd, 1931.

[3] After a succinct statement of the facts and arguments adduced in support of the claim, the Application prayed the Court:

"(A) to declare that the State of Bulgaria has failed in its international obligations:

- (1) by reason of the fact that the State Administration of Mines, on November 24th, 1934, put into force a special artificially calculated tariff for coal supplied to power stations, in order to enable the Municipality of Sofia to distort the application of the decisions given by the Mixed Arbitral Tribunal in 1923 and 1925;
- (2) by reason of the above-mentioned judgments of the District Court and of the Court of Appeal of Sofia, which deprived the Electricity Company of Sofia and Bulgaria of the benefit of the said decisions of the Mixed Arbitral Tribunal

- (a) by allowing the fictitious value fixed by the Administration of Mines to be used for the calculation of the factor 'P' in the formula for determining the tariff, [p66]
- (b) by deciding that the factor V should be calculated on the basis of the official rate of exchange decreed by the National Bank of Bulgaria and not on the basis of the rate of exchange actually applied by that Bank for the conversion of Bulgarian currency into foreign currency,
- (c) by deciding that the Company could no longer require its consumers to pay the amount of the excise duty,
- (d) by deciding that the Company could not put any tariff into operation before having obtained the formal agreement of the Municipality;

(3) by reason of the promulgation of the law of February 3rd, 1936, Article 30, paragraph C, of which establishes a special tax on the distribution of electric power purchased from undertakings not subject to tax.

(B) and to order the requisite reparation in respect of the above-mentioned acts to be made. "

[4] On January 26th, 1938, notice of the Application of the Belgian Government was given to the Bulgarian Government, and on February 1st the communications provided for in Article 40 of the Statute and Article 34 of the Rules of Court were duly despatched.

[5] As the Court does not include upon the Bench a judge of Bulgarian nationality, the Bulgarian Government availed itself of its right under Article 31 of the Statute and nominated M. Theohar Papazoff.

[6] The two Governments appointed as their Agents: the Belgian Government, M. J. G. de Ruelle, assisted by Maitre Rene Marcq and Maitre Henri Rolin, and the Bulgarian Government, M. Ivan Altinoff, assisted by Maitre Gilbert Gidel.

[7] By an Order made on March 28th, 1938, the President of the Court fixed the time-limits for the filing of the Memorial by the Belgian Government and of the Counter-Memorial by the Bulgarian Government.

[8] On July 2nd, 1938, the Belgian Government, in view of certain measures of execution against the Electricity Company of Sofia and Bulgaria, announced by the Municipality of Sofia in default of payment by that Company of a certain sum claimed from it, requested the Court, under Article 41 of the Statute and Article 61 of the Rules, to indicate, as an interim measure of protection, that the compulsory collection by the Municipality of Sofia of the said sum must be postponed pending the delivery of judgment on the merits.

[9] The Court held a hearing on July 13th, 1938, for the examination of this request, but a communication was received from the Agent for the Bulgarian Government stating that he could not be present at the hearing as the notice given was very short. The Court however heard a statement by the Agent for [p67] the Belgian Government to the effect that his Government would make no objection to the granting of the necessary time to the Bulgarian Government. After deliberation, the Court decided the same day to adjourn the proceedings in regard to the request for the indication of interim measures of protection, in order to enable the Bulgarian Government to prepare its observations upon that request and, if need be, in regard to the jurisdiction of the Court; the Agents of the Parties would be heard by the Court at a public sitting the date of which would be subsequently fixed by the President.

[10] Following upon a telegram sent on July 27th, 1938, by the Agent for the Bulgarian Government to the President of the Court, the text of which was duly communicated to the Agent for the Belgian Government, the latter informed the Court in a letter of August 26th, 1938, that in view of the statements contained in this telegram, the Belgian Government withdrew the request for the indication of an interim measure of protection presented on July 2nd, 1938.

[11] On August 27th, 1938, the President of the Court made an Order recording the withdrawal by the Belgian Government of its request for the indication of an interim measure of protection and stating that in these circumstances there was no occasion to fix the public hearing contemplated by the Court's decision of July 13th, 1938.

[12] By another Order of the same date, the President extended until October 31st, 1938, the time-limit for the filing of the Bulgarian Counter-Memorial which had originally been fixed to expire on September 12th, 1938. This time-limit, which was subsequently further extended, finally expired on November 30th, 1938.

[13] In its Memorial, the Belgian Government prayed the Court:

"A. - To declare that the State of Bulgaria has failed in its international obligations:

(1) By reason of the fact that the State Administration of Mines, on November 24th, 1934, put into force a special artificially calculated tariff for coal supplied to power stations, in order to enable the Municipality of Sofia to distort the application of the decisions given by the Mixed Arbitral Tribunal in 1923 and 1925;

(2) By reason of the above-mentioned judgments of the District Court and of the Court of Appeal of Sofia and of the judgment of the Court of Cassation of March 16th, 1938, which deprived the Electricity Company of Sofia and Bulgaria of the benefit of the said decisions of the Mixed Arbitral Tribunal;

(a) By allowing the fictitious value fixed by the Administration of Mines to be used for the calculation of the factor 'P' in the formula for determining the tariff; [p68]

(b) By deciding that the factor V should be calculated on the basis of the official rate of exchange decreed by the National Bank of Bulgaria and not on the basis of the rate of exchange actually applied by that Bank for the conversion of Bulgarian currency into foreign currency;

(c) By deciding that the Company could no longer require its consumers to pay the amount of the excise duty;

(d) By deciding that the Company could not put any tariff into operation before having obtained the formal agreement of the Municipality;

(3) By reason of the promulgation of the law of February 3rd, 1936, as supplemented by Circular No. 3800 of February 28th, 1936, and the law of April 2nd, 1936, instituting a special tax on the distribution of electric power purchased from undertakings not subject to tax.

B. - To order the respondent Party to take all administrative, legislative or other measures necessary:

1. To reinstate the Electricity Company of Sofia and Bulgaria in its rights as against both the State of Bulgaria and the Municipality, also as against any public or private consumer of current;

2. To ensure repayment to the Electricity Company of Sofia and Bulgaria of all undue payments made by it as a result of the measures complained of and compensation for any sums due which it has been prevented from collecting as a result of these measures.

C. - To authorize the Belgian Government to specify the damage sustained by the Electricity Company of Sofia and Bulgaria as a result of the facts set out above. "

[14] On November 25th, 1938, that is to say before the expiration of the time-limit finally fixed for the filing of the Counter-Memorial, the Agent for the Bulgarian Government filed a document entitled "Memorial of the Bulgarian Government" in which, as the conclusion of a preliminary objection to the jurisdiction, he prayed the Court:

"To declare that it has no jurisdiction to entertain the Application filed by the Belgian Government on January 26th, 1938.

To dismiss all the claims, pleas and submissions of the Belgian Government. "

[15] The proceedings on the merits having, under Article 62, paragraph 3, of the Rules of Court,

been suspended by the filing of the objection, the President of the Court, on November 30th, 1938, made an Order fixing January 25th, 1939, as the date of expiration of the time allowed to the Belgian Government for the presentation of a written statement of its [p69] observations and submissions in regard to the objection raised by the Bulgarian Government.

[16] The Belgian Government's written statement, entitled "Additional Memorial", was duly filed on January 25th, 1939, and accordingly on that date the case became ready for hearing in regard to the objection of the Bulgarian Government.

[17] In this written statement, the Belgian Government prayed the Court:

"To declare that it has jurisdiction,

To order the respondent Party to plead on the merits and to fix the time-limits for the further written proceedings. "

[18] In the course of public sittings held on February 27th and 28th, and March 1st, 1939, the Court heard:

M. Ivan Altinoff, Agent, and Maitre Gilbert Gidel on behalf of Bulgaria; and M. J. G. de Ruelle, Agent, and Maitre Henri Rolin on behalf of Belgium.

[19] The submissions made in the written proceedings were not amended on either side in the course of the oral proceedings.

[20] Documents in support of their contentions were filed on behalf of either Party [FN1].

[FN1] See list in annex.

[21] The above being the state of the proceedings, the Court must now adjudicate.

[22] The facts are as follows:

[23] A concession for the distribution of electric current for light and power was granted by the Municipality of Sofia in 1898 to a French company, the Société des Grands Travaux de Marseille. In 1909 the said French company transferred its rights to the "Electricity Company of Sofia and Bulgaria", a company founded in Brussels on September 8th, 1908, by a notarial act published in the Moniteur belge on September 23rd, 1908. The transfer was approved by the Municipality of Sofia with some modifications of the original contract, the concession being due to expire on December 31st, 1940. The rights and obligations of exploitation are set out in the contract of concession of

1898, the specification annexed thereto, and the contract of transfer of 1909.

[24] During the War of 1914-1918, which found Belgium and Bulgaria on opposite sides, the works of the Belgian Company were taken over by the Municipality of Sofia on [p70] September 1st, 1916. After the conclusion of peace, the Belgian Company, under Article 182 of the Treaty of Neuilly of November 27th, 1919, was given the right to restitution of its property with an indemnity to be assessed by a Mixed Arbitral Tribunal, which was also entrusted with the task of adapting the concession contract to the new economic conditions in case of disagreement between the parties. Consequently, a suit was instituted by the Company before the Belgo-Bulgarian Mixed Arbitral Tribunal against the State of Bulgaria and against the Municipality of Sofia.

[25] On July 5th, 1923, the Belgo-Bulgarian Mixed Arbitral Tribunal gave a first judgment decreeing inter alia the restitution of the Belgian Company's property and the restoration of its position as existing before the war, subject to modifications to be decided by the Mixed Arbitral Tribunal in application of Article 182 of the Treaty of Neuilly. Accordingly, the Mixed Arbitral Tribunal nominated a commission of experts for the purpose of fixing a flexible tariff - which should take into account the new economic conditions and future variations of different elements relevant to the fixing of the sale-price of electric current - such as salaries, the rate of the lev and its purchasing power - and also for the purpose of assessing the amount of the indemnity. The expert's deposited their report on March 3rd, 1924, with the Mixed Arbitral Tribunal, which on May 27th, 1925, delivered its final judgment (a clerical error in which was corrected by a judgment rendered on October 30th, 1925). This judgment, in brief: (1) dismissed the applicant's claims against the State of Bulgaria; (2) ordered the immediate restitution of the Company's property, the payment of a sum of 9, 000, 000 Belgian francs by the Municipality of Sofia to the Company, the prolongation of the concession to December 31st, 1960, and the acceptance of the formula arrived at by the experts for fixing the selling price.

[26] The application of the formula, which is composed of different factors, such as "P" (price of coal), "t" (cost of transport), "T" (rate of exchange), "S" (salaries), "x" (taxation), appears to have encountered no serious difficulties until the last quarter of 1934, when a controversy arose in regard to the value to be assigned to the factor "P"..

[27] On October 6th, 1934, the Electricity Company communicated to the Municipality as usual the data for the determination of the tariff for the fourth quarter of 1934. The value attributed to the term "P" therein was 330 leva. The Municipality requested that the documents in support of the figures should be furnished.

[28] On October 24th, 1934, the State Mines Administration delivered to the Electricity Company a certificate indicating [p71] that the price of second quality coal was 360 leva per ton for the "first zone". This certificate was forwarded by the Electricity Company on November 15th, 1934, to the Municipality, which informed the Company on November 20th that it could not accept the certificate supplied by the Mines Administration on October 24th, 1934, because it related to second quality coal at that particular time and not to second quality coal unsorted (tout-venant) as produced in 1925 and as referred to in the judgment of the Mixed Arbitral Tribunal.

[29] On November 26th, 1934, the Company received from the State Mines Administration a notice stating that, by a decision of November 24th of the Board of Directors, the prices of coal destined for the production of electric current were fixed at a certain figure. The Electricity Company protested against this figure, but finally an agreement, with certain reservations, was reached fixing the tariff for the year 1935 at a certain rate per kilowatt-hour of current distributed.

[30] After the devaluation of the Belgian franc on April 1st, 1935, the Electricity Company, by a letter addressed to the Municipality on October 29th of that year, observed that the introduction of the new rate of exchange in the calculation of the tariff according to the formula of the Mixed Arbitral Tribunal led to results very near to those agreed on for the year 1935 and announced its decision to adhere strictly, for the year 1936, to the judgments of the Mixed Arbitral Tribunal, pointing out that the term "P" should be understood as applying to the second quality of coal appearing in the price list at the time when the formula was established.

[31] On December 13th, 1935, the Municipality replied by letter that the formula contained elements that were inapplicable and led to absurd results, in that it did not take into consideration the real state of affairs and the economic condition prevailing in Sofia. No agreement was reached on this issue and, by letter dated January 31st, 1936, the Municipality expressed its intention no longer to authorize the Company to recover from consumers the amount of the excise duty.

[32] A new exchange of letters between the Company and the Municipality also led to no result.

[33] By a note verbale dated January 28th, 1936, the Belgian Legation at Sofia proposed to the Bulgarian Minister of Foreign Affairs the joint submission by the Municipality and the Company to the Mixed Arbitral Tribunal of the divergences of interpretation to which the factor "P" (price of coal) in the formula had given rise. To this the Bulgarian Ministry for Foreign Affairs, by [p72] a note verbale dated February 18th, 1936, replied that the Municipality and the Ministry of Agriculture could not accept this proposal. The note verbale added that the Mixed Arbitral Tribunal no longer existed and could not be revived, and that the Municipality had therefore seen fit to have recourse to the only tribunal competent to adjudicate in the matter, namely the Regional Court of Sofia.

[34] The Company having seized the Mixed Arbitral Tribunal the Council of the League of Nations, in application of provisions in the Treaty of Neuilly, appointed a substitute in the place of the Bulgarian arbitrator on the Mixed Arbitral Tribunal. The Tribunal rendered a judgment on December 29th, 1936, declaring the claim of the Company inadmissible, either as a request concerning the interpretation of the original award, because the time-limit for this had expired, or as a request for execution, because the latter was a question exclusively for the two Governments.

[35] Meanwhile, as had already been stated, the Municipality had instituted a suit against the Company before the Regional Court of Sofia for the determination of the rights and obligations in respect of the sale price of electric current. In this suit the Municipality also claimed that the Company had no right to collect either from the subscribers or from the Municipality the price of the current consumed calculated according to the formula of the arbitral judgment until the price in question had been approved by the Municipality, according to Article 21 of the contract specification. It further asked for the appointment of experts to establish the real value of the factors

"P" (price of coal) and "x" (taxation) and, thereby, the legal sale price per kilowatt-hour.

[36] In its defence the Company contested both the jurisdiction of the Regional Court and the admissibility of the suit; alternatively, on the merits, it requested that, in case the Court should order an expert enquiry as to the terms "P" (price of coal) and "x" (taxation), it should have the terms "S" (salaries) and "r" (exchange) likewise examined.

[37] The Regional Court, in its decision of October 24th, 1936, on the merits, found in favour of the Municipality as regards the interpretation of the terms "P" (price of coal) and "r" (exchange) and, to a certain extent, in favour of the Company as regards the interpretation of the term "x" (taxation).

[38] Both parties appealed to the Sofia Court of Appeal which by its judgment of March 27th, 1937, confirmed that part of the judgment of the Regional Court which was in favour of the Municipality and reversed that part which was in favour of the Company. An appeal against this judgment was made by the Company on June 23rd, 1937, to the Court of Cassation. [p73]

[39] In the meantime a new income tax law dated January 24th, 1936, was promulgated on February 3rd of the same year by the Bulgarian Government. Article 30 of this law created a different rate of taxation as between electricity companies producing electric current themselves and those purchasing it from undertakings not subject to taxation; the Article was subsequently defined, in respect of Municipalities, by a circular published in the Official Journal of March 4th, 1936, and modified, in respect of State mines and hydraulic syndicates, by a law dated April 2nd, 1936, published in the Official Journal of April 16th, 1936.

[40] On May 18th, 1936, the Company wrote to the Bulgarian Minister of Finance, saying that there was an error in the estimation of the tax referred to in Article 30 (b) of the Income Tax Law dated January 24th, 1936, and promulgated on February 3rd of the same year, and requested him to verify the accuracy of the figures submitted by it and to make the corresponding corrections in the said Article.

[41] On April 22nd, 1937, the Belgian Minister at Sofia, in a letter to the Bulgarian President of the Council and Minister for Foreign Affairs and Public Worship, complained of the attitude of the Mayor of Sofia in invoking the judgment of the Court of Appeal, against which the Company had decided to appeal to the Court of Cassation, adding that "the Electricity Company has never ceased to declare that it will comply with any judgment by the Bulgarian courts which, after the exhaustion of all the remedies provided for in the proceedings, shall have acquired the effect of a final judgment", and that "the recent judgment of the Court of Appeal has no executory force, because the action brought against the Electricity Company by the Mayor was for the purpose of determining facts (constatatoire) and not for the purpose of securing a conviction (condamnatoire)".

[42] On June 24th, 1937, the Belgian Minister at Sofia, in a letter to the Bulgarian President of the Council and Minister for Foreign Affairs and Public Worship, referred to the dispute between the Municipality and the Company as one resulting from the intervention of "certain administrative and judicial authorities of the Bulgarian State". The Belgian Minister expressed the view that the decision of the Court of Appeal of Sofia on March 27th, 1937, had disregarded the rights of the Company as

defined by the Belgo-Bulgarian Mixed Arbitral Tribunal in its judgments of July 5th, 1923, and May 27th, 1925. In these circumstances the Minister intimated that the dispute in question was one which, according to Articles 4 and 6 of the Treaty of conciliation, arbitration and judicial settlement entered into between Bulgaria and Belgium on June 23rd, 1931, might be unilaterally submitted to the Permanent Court of International Justice "(à la clause de compétence obligatoire de laquelle la Bulgarie, a, d'autre part, adhère [p74] le 21 août 1921)", unless an agreement was reached to submit it to arbitration. He therefore proposed to the Bulgarian Government that the case should be referred to the Permanent Court of International Justice by means of a special agreement and added that, if no agreement on the terms of this special agreement could be reached in two months, the Belgian Government, availing itself of its rights, would bring the case before the Permanent Court of International Justice unilaterally by application.

[43] In a letter of July 30th, 1937, addressed to the President of the Council and Minister for Foreign Affairs and Public Worship, the Belgian Minister in Sofia repeated and confirmed this declaration.

[44] On August 3rd, 1937, the Bulgarian President of the Council and Minister for Foreign Affairs and Public Worship replied by letter to the Belgian Minister at Sofia that, as in his opinion the disputes between the Municipality and the Company "depend on the exclusive competence of the Bulgarian tribunals which have already had occasion to render their decision to this effect", the Bulgarian Government could not agree to a proposition of compromise tending to bring this dispute before another jurisdiction, and that, "in so far as the communication that, in default of a compromise, the Belgian Government, basing itself on Articles 4 and 6 of the Treaty of conciliation, arbitration and judicial settlement between Bulgaria and Belgium, would lay the case unilaterally before the Permanent Court of International Justice, is concerned", the Bulgarian Government, by application of Article 3 of that Treaty, claimed in this case the jurisdiction of its own tribunals and could not consent to the dispute being submitted to the various procedures provided in the Treaty. By the same letter the Bulgarian Government informed the Belgian Government that Bulgaria denounced the Treaty in accordance with the third paragraph of Article 37 of that instrument.

[45] On January 26th, 1938, the Belgian Government filed with the Registry of the Court the Application instituting the present proceedings.

[46] On March 16th, 1938, the Court of Cassation dismissed the appeal made by the Company on June 23rd, 1937.

[47] These are the facts, undisputed in the present case, having regard to which the Court is now called upon to adjudicate upon the preliminary objection raised by the Bulgarian Government.

[48] Before considering the preliminary objection upon which the Court has to adjudicate, the attitude of the Parties with regard to the grounds on which they have based their arguments must be determined. [p75]

[49] In order to found the jurisdiction of the Court, the Belgian Government, both in its Application and in its Memorial, relies on the one hand on the Declarations of Belgium and Bulgaria accepting the compulsory jurisdiction of the Court, Declarations which were ratified on March 10th, 1926, and August 12th, 1921, respectively; and, on the other hand, on the Treaty of conciliation, arbitration and judicial settlement of June 23rd, 1931, which came into force on February 4th, 1933 [FN1].

[FN1] League of Nations Treaty Series, Vol. 137, p. 191.

[50] The Bulgarian Government for its part has also relied on both, of these agreements to support its preliminary objection to the jurisdiction.

[51] In these written proceedings, the Parties adopted the same method in their endeavour to establish that their respective contentions were well founded; that is to say, they examined the Belgian Application of January 1938 in the light of the conditions independently laid down by each of these two agreements. Neither the Bulgarian Government 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.

[52] The same attitude was adopted by the Agents of the two Governments in the oral proceedings. Thus the Agent for the Belgian Government stated that "either of these two instruments in reality suffices by itself to support our claims, and it would be most regrettable if the conclusion were reached that the simultaneous existence of the two instruments weakens our position". It is true that one of the Counsel for the Belgian Government at one time expressed the personal opinion - which he subsequently described as a "suggestion" that "from February 3rd, 1933, the date of the coming into force of the Treaty of 1931, until February 3rd, 1938", the legal relations between Belgium and Bulgaria had been governed by the Treaty of 1931 alone. In the afternoon however of the same hearing, the same Counsel retracted his personal opinion or suggestion and declared that "the Treaty was only to be regarded as having suspended the optional clause in so far as it modified that clause".

[53] This led the Agent for the Bulgarian Government to take up a definite position on the point. He proceeded to demonstrate by numerous arguments that "the signature of the Treaty of conciliation of 1931 between Bulgaria and Belgium, which refers in Article 4 to the disputes enumerated in Article 36 of the Court's Statute, in no way suspended the operation of the optional clause.... ". "On the contrary", he said, "far from tacitly abrogating, or at any rate suspending the operation of [p76] the optional clause for the duration of the Treaty, the two paragraphs of Article 4 simply reinforce and do not set aside the obligation resulting from the optional clause. "

[54] The Court holds that the suggestions first made by Counsel for the Belgian Government cannot be regarded as having the effect of modifying that Party's attitude in regard to this question. The Belgian Government in fact has always been in agreement with the Bulgarian Government in holding that, when the Application was filed, their declarations accepting the Court's jurisdiction as

compulsory were still in force.

[55] The Court shares the view of the Parties. In its opinion, 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 ultimate result that no jurisdiction would remain.

[56] In concluding the Treaty of conciliation, arbitration and judicial settlement, the object of Belgium and Bulgaria was to institute a very complete system of mutual obligations with a view to the pacific settlement of any disputes which might arise between them. There is, however, no justification for holding that in so doing they intended to weaken the obligations which they had previously entered into with a similar purpose, and especially where such obligations were more extensive than those ensuing from the Treaty.

[57] It follows that if, in a particular case, a dispute could not be referred to the Court under the Treaty, whereas it might be submitted to it under the declarations of Belgium and Bulgaria accepting as compulsory the jurisdiction of the Court, in accordance with Article 36 of the Statute, the Treaty cannot be adduced to prevent those declarations from exercising their effects and disputes from being thus submitted to the Court.

[58] It is necessary therefore in the first place to consider whether the objections raised by the Bulgarian Government to the jurisdiction of the Court under the Treaty are well-founded or not. Should they prove well-founded, the Court will then consider the objections raised by that Government under the declarations above mentioned. Only if both these sets of objections are alike held to be well-founded will the Court decline to entertain the case.

[59] The Court will consider the bearing of the arguments of the Bulgarian Government on the final submissions of the Belgian Government's Application under A, Nos 1 and 2, respecting the complaints concerning the application by the Bulgarian authorities of the decisions of the Mixed Arbitral Tribunal [p77] in 1923 and 1925; it will then consider their bearings on the submission made under A, No. 3, which relates to the promulgation of the Bulgarian law of February 3rd, 1936, concerning income tax.

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[60] The Court will first examine the Bulgarian argument concerning the application of the Treaty of 1931, which was relied on in the first place by the Belgian Government in its Memorial of August 26th, 1938.

[61] In support of its Application, the Belgian Government invokes Article 4 of the Treaty, which runs as follows:

"All disputes with regard to which the Parties are in conflict as to their respective rights shall 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. "

[62] The opposing argument of the Bulgarian Government consists of two contentions, as follows:

[63] In the first place, the Bulgarian Government complains of the silence of the Belgian Memorial as to the respective "rights" in regard to which the Parties are in conflict; that Government supposes that the right which is denied to Bulgaria is the right of deciding disputes that arise between the Belgian concessionaire and the Bulgarian grantor of a public service in Bulgaria, on the subject of the application of the formula determining the price of electric current. "The Bulgarian Government insists that the right of the Bulgarian authorities to exercise jurisdiction over disputes concerning the application of provisions governing the working conditions of a public service conceded in Bulgaria to a foreign concessionaire, is inherent in the sovereignty of the Bulgarian State. The Bulgarian Government protests against any claim to invoke the Treaty of pacific settlement of June 23rd, 1931, for the purpose of disputing this right."

[64] The Belgian Government explains in its Additional Memorial of January 22nd, 1939, that "the rights which the Belgian Government relies on... are the right to the cessation of acts prejudicial to the Electricity Company of Sofia and Bulgaria, carried out by various organs of the Bulgarian State, in violation of the latter's international obligations, and the right to obtain reparation for the damage resulting for the Belgian Company"; the Belgian Government has thus raised a point of an international character in this dispute. This last point has been [p78] contested from the outset and particularly during the discussion of the question whether the Belgian complaints do or do not fall within one or other of the categories of disputes referred to in Article 36 of the Statute (also mentioned in Article 4 of the Treaty of 1931). But the argument *ratione materię* thus developed and used in support of the preliminary objection to the jurisdiction forms a part of the actual merits of the dispute. The Court cannot therefore regard this plea as possessing the character of a preliminary objection within the meaning of Article 62 of the Rules.

[65] In the second place, the Bulgarian Government raised an argument based on the non-observance of the provisions of Article 3 of the Treaty by the Belgian Government.

[66] This Article is as follows:

"1. In the case of a dispute the occasion of which, according to the municipal law of one of the High Contracting 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 Treaty until a decision with final effect has been pronounced within a reasonable time by the competent authority.

2. In such a case the Party which desires to resort to the procedures laid down in the present Treaty must notify the other Party of its intention within a period of one year from the date of the under-mentioned decision. "

[67] The Bulgarian Government alleges that the Application of January 26th, 1938, was introduced before a decision with final effect - namely the judgment of the Bulgarian Court of Cassation - was rendered, and that on that ground the application was premature and irregular.

[68] As regards the application of Article 3 of the Treaty of 1931, the following considerations must be borne in mind.

[69] This Article 3 occurs in Chapter I headed "Pacific Settlement in general", amongst provisions of a general nature, applicable to all the procedures provided for in the Treaty of 1931. This fact alone serves to show the importance attached to the clause relating to the exhaustion of local remedies, which applies to all the procedures mentioned.

[70] Article 3 itself consists of two paragraphs.

[71] The hypothesis in paragraph 1 is that, according to the municipal law of one of the High Contracting Parties, the subject of the dispute is within the jurisdiction of its judicial or administrative authorities. This hypothesis is fulfilled in the present case; for the Belgian Government does not deny that the dispute between the Belgian Electricity Company and the Bulgarian authorities concerning alleged failure by the Bulgarian authorities to observe the formula drawn up by the [p79] Mixed Arbitral Tribunal is within the jurisdiction of the Bulgarian courts.

[72] The same Article authorizes the respondent Party to "object to the matter in dispute being submitted for settlement by the different methods laid down in the present Treaty". This formality was observed by the Bulgarian Government, in particular in the letter addressed to the Belgian Minister in Sofia by the President of the Council, Minister for Foreign Affairs and Public Worship, and dated Sofia August 3rd, 1937; in this letter, of which the date is several months earlier than the introduction of the Application on January 26th, 1938, is the following passage: "With reference to the communication that, failing a special agreement, the Belgian Government would make a unilateral application to the Permanent Court of International Justice, relying on Articles 4 and 6 of the Treaty of conciliation, arbitration and judicial settlement between Bulgaria and Belgium, I feel bound to draw your Government's attention to the fact that, in application of Article 3 of that Treaty, the Bulgarian Government claims that its own courts have jurisdiction in this matter, and it cannot consent to the submission of the dispute to the different procedures provided in the said Treaty. "

[73] The following words of Article 3, No. 1, indicate the limit of time imposed on the submission of an application: "... until a decision with final effect has been pronounced within a reasonable time by the competent authority".

[74] There being no dispute as to the reasonableness of the time within which the decision was pronounced, the controversy is reduced to the following question: at the time of the application was there a decision with final effect, or had that decision with final effect not yet been pronounced?

[75] The Belgian Government claims that it has not failed to observe the provisions of Article 3, No. 1, seeing that the subsequent decision of the Court of Cassation could not have been regarded by the contracting Parties to be that referred to in Article 3, No. 1; this ultimate Court constitutes an extraordinary remedy, and in any case the appeal in cassation had been lodged and this fact might be deemed to constitute a fulfilment of the required condition.

[76] Whatever the term applied by the Sofia Court of Appeal to its judgment, the fact remains that it was not a decision with final effect within the meaning given to that expression by Article 3, No. 1. The local remedies rule contemplated by the Treaty of 1931 implies the exhaustion of all appeals, including appeals to the Court of Cassation, a decision by which alone renders the judgment final either by annulling the judgment of the Court of Appeal and sending the case back for a re-trial, or by rejecting the appeal. [p80]

[77] No. 2 of Article 3 still further emphasizes the importance of the provision in No. 1; for, according to No. 2, a Party which desires in the circumstances contemplated by No. 1 to resort to the procedures laid down in the Treaty must notify the other Party of its intention within a period of one year from the date of the decision with final effect referred to in No. 1.

[78] The Belgian Government has vainly relied upon Article 37 (4) which runs as follows:

"4. Notwithstanding denunciation by one of the High Contracting Parties, the proceedings pending at the expiration of the current period of the Treaty shall be duly completed. "

[79] This clause does not apply: it presupposes proceedings validly instituted, and this, is not the case here owing to the absence of a decision with final effect on January 26th, 1938. Moreover, the irregularity of the Belgian Application was not removed by the judgment rendered on March 16th, 1938, by the Bulgarian Court of Cassation, for in the meantime, i. e. on February 4th, 1938, the Treaty of 1931 had expired, having been denounced by the Bulgarian Government.

[80] Accordingly, since the Belgian Application has not been submitted in accordance with the conditions laid down by the Treaty of 1931, the Belgian Government cannot found the jurisdiction of the Court on that Treaty.

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[81] The negative result arrived at by the examination of the first source of jurisdiction does not however dispense the Court from the duty of considering the other source of jurisdiction invoked separately and independently from the first.

[82] The Court will now proceed to consider the Bulgarian Government's argument relating to the declarations of adherence to the Optional Clause of the Court's Statute.

[83] With regard to their terms, the declarations of adherence of Bulgaria and Belgium differ in that the declaration of the Bulgarian Government runs as follows:

"On behalf of the Government of the Kingdom of Bulgaria I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory ipso facto and without any special convention, unconditionally",

and contains no reservation apart from the condition of reciprocity, whereas the declaration of the Belgian Government runs as follows: [p81]

"On behalf of the Belgian Government, I recognize as compulsory, ipso facto and without special agreement, in relation to any other Member or State accepting the same obligations, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court for a period of fifteen years, in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement. "

[84] The Bulgarian Government relies on the limitation *ratione temporis* embodied in the Belgian declaration concerning the situations or facts with regard to which the dispute has arisen, in order to dispute the jurisdiction of the Court. Although this limitation does not appear in the Bulgarian Government's own declaration, it is common ground that, in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36 of the Court's Statute and repeated in the Bulgarian declaration, it is applicable as between the Parties.

[85] The Parties agree that the date on which the dispute arose was June 24th, 1937, i. e., after March 10th, 1926 - the date of the establishment of the juridical bond between the two States under Article 36 of the Court's Statute.

[86] On the other hand, the Bulgarian Government in its argument raises the following point: Although the facts complained of by the Belgian Government in the submissions of its Application under A, Nos. 1 and 2, all date from a period subsequent to March 10th, 1926, the situation with regard to which the dispute arose dates back to a period before that date. This situation was created by the awards of the Belgo-Bulgarian Mixed Arbitral Tribunal and in particular by the formula established by the awards of July 5th, 1923, and May 27th, 1925, for the fixing of the price per kilowatt-hour of power distributed. The complaints made by the Belgian Government concerning the application of this formula by the Bulgarian authorities relate, it is contended, to the working of that formula and make it the centre point of the dispute. It has also been argued that since the situation resulting from that formula dates from before the material date, namely, March 10th, 1926, the Bulgarian Government is justified in holding that the dispute which has arisen in regard to it falls outside the Court's jurisdiction by reason of the limitation *ratione temporis* contained in the Belgian declaration.

[87] The Court cannot accept this view. It is true that it may be said that the awards of the Mixed Arbitral Tribunal established between the Belgian Electricity Company and the Bulgarian authorities a situation which dates from before March 10th, [p82] 1926, and still persists at the present time. Nevertheless, the dispute between the Belgian Government and the Bulgarian Government did not arise with regard to this situation or to the awards which established it. The Court would recall in this connection what it said in the Judgment of June 14th, 1938 (*Phosphates in Morocco. Preliminary Objection*). The only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction accepted in the terms of the Belgian declaration are those which must be considered as being the source of the dispute. No such relation exists between the present dispute and the awards of the Mixed Arbitral Tribunal. The latter constitute the source of the rights claimed by the Belgian Company, but they did not give rise to the dispute, since the Parties agree as to their binding character and that their application gave rise to no difficulty until the acts complained of. It is

not enough to say, as it is contended by the Bulgarian Government, that if it had not been for these awards, the dispute would not have arisen, for the simple reason that it might just as well be said that, if it had not been for the acts complained of, the dispute would not have arisen. It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute. In the present case it is the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities with regard to a particular application of the formula - which in itself has never been disputed - which form the centre point of the argument and must be regarded as constituting the facts with regard to which the dispute arose. The complaints made in this connection by the Belgian Government relate to the decision of the Bulgarian State Administration of Mines of November 24th, 1934, and to the judgments of the Bulgarian courts of October 24th, 1936, and March 27th, 1937. These are facts subsequent to the material date. Accordingly, the Court considers that the argument based on the limitation *ratione temporis* in the Belgian declaration is not well-founded.

[88] In connection with the Belgo-Bulgarian declarations of acceptance of the Court's compulsory jurisdiction, the Bulgarian Government puts also forward another argument in support of its objection to the jurisdiction. In its contention, the present dispute does not fall within any of the categories of Article 36 of the Court's Statute, a general provision which enumerates the legal disputes for which the Court is competent. Although this argument is designed to prove that the Court has no jurisdiction and to prevent the proceedings from being continued, the Court, after considering its scope, has arrived at the conclusion [p83] that this objection is closely linked to the merits of the case. The reasoning in fact aims at establishing that there is no international element in the legal relation created between the Belgian Company and the Bulgarian authorities by the awards of the Mixed Arbitral Tribunal. But that 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. The Court cannot therefore regard this plea as possessing the character of a preliminary objection within the meaning of Article 62 of the Rules

[89] In these circumstances, the Court cannot accept the contention that it lacks jurisdiction under the declarations of adherence to the Optional Clause, in so far as this contention is based on the argument *ratione temporis*; and in so far as this contention is founded on the argument *ratione materiae*, the Court does not regard it as preliminary in character and consequently rejects it, though the Parties remain free to take it up again in support of their case on the merits.

[90] The attempt to prove that the Court lacks jurisdiction under the Optional Clause is thus unsuccessful as regards A, No. 1, and A, No. 2.

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[91] The last complaint adduced by the Belgian Government to the Bulgarian Government - which is formulated in its submissions under A, No. 3, of the Belgian Application, relates to the promulgation of the law of February 3rd, 1936, of which Article 30, paragraph C, institutes a special tax on the distribution of electric power sold to concerns not subject to tax.

[92] In the contention of the Belgian Government, the promulgation of the law constitutes a failure by the Bulgarian Government to observe its international obligations, owing to the discriminatory character of this law.

[93] The Bulgarian Government argues that this contention of the Belgian Government is inadmissible because the claim respecting the law of February 3rd, 1936, did not form the subject of a dispute between the two Governments prior to the filing of the Belgian Application.

[94] The Court considers this argument of the Bulgarian Government to be well-founded. Under either the Treaty of 1931 or the declarations of adherence to the Optional Clause it rested with the Belgian Government to prove that, before the filing of the Application, a dispute had arisen between the Governments respecting the Bulgarian law of February 3rd, 1936. The Court holds that the Belgian Government has not established the existence of such a dispute and accordingly declares 'that the Belgian Application cannot be entertained in so far as concerns that part of the claim relating to this law. [p84]

[95] FOR THESE REASONS,

The Court, by nine votes to five,

Adjudicating upon the preliminary objection raised by the Bulgarian Government to the Application of the Belgian Government:

1. With regard to points 1 and 2 of Submission A of the Application, overrules the objection of the Bulgarian Government; reserves this part of the Application of the Belgian Government for judgment on the merits; states that the time-limits for the continuance of the proceedings will be fixed by an Order bearing the date of the present judgment.
2. With regard to point 3 of Submission A of the Application, upholds the objection of the Bulgarian Government; and dismisses this part of the Application of the Belgian Government.

[96] The present judgment has been drawn up in French in accordance with Article 39, paragraph 1, of the Statute of the Court, the Parties having agreed that the case should be conducted in French.

[97] Done at the Peace Palace, The Hague, this fourth day of April, one thousand nine hundred and thirty-nine, in three copies, one of which will be deposited in the archives of the Court and the others will be communicated to the Government of the Kingdom of Belgium and to the Government of the Kingdom of Bulgaria, respectively.

(Signed) J. G. Guerrero,
President.

(Signed) J. López Oliván,
Registrar. [p85]

[98] M. Anzilotti, M. Urrutia, Jonkheer Van Eysinga, M. Hudson, Judges, and M. Papazoff, Judge ad hoc, declare that they are unable to concur in the judgment given by the Court and, availing

themselves of the right conferred upon them by Article 57 of the Statute, have appended to the judgment the separate opinions which follow.

[99] M. De Visscher and M. Erich, Judges, while in agreement with the operative clause of the judgment, have each appended observations regarding some of the grounds.

(Initialled) J. G. G.

(Initialled) J. L. O. [p86]

Separate Opinion by M. Anzilotti.

[Translation]

[100] I regret that I am unable to agree with the way in which the judgment views the relation between the two sources of jurisdiction relied upon by the applicant Party. This question is so important and its bearing is so wide that I find myself obliged to explain the reasons for my dissent.

[101] 1.- The facts of the situation giving rise to this question are briefly as follows.

[102] On July 29th, 1921, the Bulgarian Government signed a Declaration adhering to the Optional Clause concerning the compulsory jurisdiction of the Permanent Court of International Justice in the following terms :

"On behalf of the Government of the Kingdom of Bulgaria I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory ipso facto and without any special convention, unconditionally."

[103] This Declaration was ratified on August 12th of the same year.

[104] The Belgian Government signed its Declaration accepting the compulsory jurisdiction of the Court on September 25th, 1925. This Declaration is as follows :

"On behalf of the Belgian Government, I recognize as compulsory, ipso facto and without special agreement, in relation to any other Member or State accepting the same obligations, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court for a period of fifteen years, in any dispute arising after the ratification of the present Declaration with regard to situations or facts subsequent to this ratification, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement."

[105] The ratification was deposited on March 10th, 1926.

[106] Article 36 of the Court's Statute to which the two Declarations refer is as follows :

"The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing [p87] or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in 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.

The Declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

[107] As a result of these Declarations, an agreement came into existence between the two States accepting the compulsory jurisdiction of the Court, in conformity with Article 36 of the Statute and subject to the limitations and conditions resulting from the declarations, more especially from that of the Belgian Government. This agreement, hereinafter referred to as the Declarations, came into force on March 10th, 1926, the date of the Belgian ratification. The Bulgarian Declaration is made without limitation of time, but the Belgian Declaration being made for a period of fifteen years as from the date of ratification, the duration of the Declarations is until March 10th, 1941.

[108] On the other hand Belgium and Bulgaria, on June 23rd, 1931, signed a Treaty of conciliation, arbitration and judicial settlement which was ratified on February 4th, 1933, and Chapter II of which, entitled "Judicial Settlement", deals, inter alia, with recourse to the Court.

[109] The articles of the Treaty of June 23rd, 1931, which should be kept in mind on the one hand for comparison with the text of the Declarations and of Article 36 of the Statute on the other, are in particular Articles 4, 1 and 3. The first directly concerns recourse to the Court ; the other two, which are in Chapter I which is entitled "Pacific Settlement in general", apply to all the procedures contemplated by the Treaty and consequently also to recourse to the Court. These Articles are as follows :

Article 4. - "All disputes with regard to which the Parties are in conflict as to their respective rights shall 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. [p88]

[110] 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."

Article 1 . - "Disputes of every kind which may arise between the High Contracting Parties and which it may not have been possible to settle by diplomacy shall be submitted, under the conditions laid down in the present Treaty, to judicial settlement or arbitration, preceded, according to circumstances, as a compulsory or optional measure, by recourse to the procedure of conciliation."

Article 3. - "1. In the case of a dispute the occasion of which, according to the municipal law of one of the High Contracting 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 Treaty until a decision with final effect has been pronounced within a reasonable time by the competent authority.

2. In such a case, the Party which desires to resort to the procedures laid down in the present Treaty must notify the other Party of its intention within a period of one year from the date of the aforementioned decision."

[111] This treaty, hereinafter called the Treaty, was concluded for a period of five years as from the date of exchange of ratifications and was to be automatically renewed for successive periods of five years unless denounced at least six months before the expiration of a five year period. It was denounced by the Bulgarian Government on August 3rd, 1937, and thus expired on February 4th, 1938.

[112] The Application of the Belgian Government was filed on January 25th, 1938, that is to say before the date of expiration of the Treaty ; the question therefore arises which of the rules of the Declarations and of the Treaty are applicable to it ; in other words whether the Declarations, or the Treaty, or both are to be taken as the basis in examining the question whether the Court can entertain the Application and adjudicate upon the merits of the case. It is with regard to this question that I find it impossible to agree with the standpoint adopted in the judgment.

[113] In my opinion, when the Belgian Government's Application was filed, only the Treaty was applicable between the two States, and it is on the basis of the Treaty and of the Treaty alone that it has to be decided whether the Court can entertain the Application and adjudicate on the merits.

[114] 2. - Before setting out my arguments, one observation is necessary.

[115] The Belgian Government relies upon both the Declarations and the Treaty in order to establish the jurisdiction of the [p89] Court to adjudicate upon its Application. It is not quite clear whether that Government relies upon them both equally or whether it places more reliance on one than on the other, and if so which: in the course of the written proceedings and more especially in the oral proceedings, there were signs of some indecision on the point, so that it is difficult to form an absolutely definite opinion on this subject. I regard it however as certain that the Belgian Government holds that it can rely on both sources of the Court's jurisdiction.

[116] As for the Bulgarian Government, in its Memorial it disputed the jurisdiction of the Court under either the Declarations or the Treaty ; and at the oral proceedings its Agent positively maintained, contrary to certain observations of Counsel for the Belgian Government, that the coming into force of the Treaty had not suspended the operation of the Declarations. It may therefore be said that both the Parties consider that the Declarations and the Treaty are alike applicable in this case.

[117] It appears to me certain however that this attitude on the part of the Parties can neither dispense the Court from itself examining and answering the purely legal question of the relation between the two sources of its jurisdiction nor in any way restrict its freedom in this respect.

[118] The position would perhaps be different if the agreement between the Parties had been in regard to the question whether the Court has jurisdiction or not. But here the situation is quite otherwise: the Belgian Government maintains and the Bulgarian Government denies that the Court has jurisdiction. The agreement, if we can call it an agreement, only relates to the sources of law to be applied. Such an agreement, which clearly results from the way in which each Party views the interests of its own defence, is of no importance for the Court.

[119] 3. - If we compare the text of the Declarations, which, together with Article 36 of the Statute, determine the content of the Agreement concluded between the two Governments, with the articles of the Treaty reproduced above, it is easy to see that these constitute two conventions between the Belgian Government and the Bulgarian Government which lay down different rules for the same thing, namely recourse to the Court. 1

[120] Confining myself to the points of most importance in this case, I would make the following observations.

[121] Under a clause of the Belgian Declaration which, by virtue of the condition of reciprocity, is binding as between the Parties, the Declarations except from the compulsory jurisdiction of the Court disputes which, though falling under one or more of the categories set out in Article 36 of the Statute and arising subsequent to the ratification of the Declaration, have [p90] not arisen "with regard to situations or facts subsequent to this ratification". The Treaty does not make this reservation : all disputes of this kind which may arise after ratification, definitely fall within the Court's jurisdiction, as defined in Article 4, even if they have not arisen "with regard to situations or facts subsequent to this ratification".

[122] On the other hand, the Treaty makes recourse to the Court subject to the conditions laid down in Articles 1 and 3, namely: in all cases there must have been preliminary diplomatic negotiations which have proved unsuccessful and, in certain cases, there must exist a decision with final effect rendered by the competent judicial or administrative authorities. The Declarations do not make these conditions; the interested Party cannot therefore rely upon them to prevent the submission of the case to the Court. I leave aside the question whether, and within what limits, any analogous rules of general international law might be invoked against recourse to the Court under the Declarations. It is clear in any case that that is something quite different from the application of Articles 1 and 3 of the Treaty.

[123] It follows that there are or may be cases where recourse to the Court is permitted by the Treaty but not by the Declarations, and cases where recourse to the Court is possible under the Declarations but not under the Treaty.

[124] It is clear that, in the same legal system, there cannot at the same time, exist two rules relating to the same facts and attaching to these facts contradictory consequences. It is for instance impossible that the relations between two States should be governed at one and the same time by a rule to the effect that, if certain conditions are fulfilled, the Court has jurisdiction and by another rule laying down that, if the same conditions are fulfilled, the Court has no jurisdiction - by a rule to the

effect that in certain circumstances the State concerned may have recourse to the Court and by another to the effect that in the same circumstances-the State has no right to do so, etc., etc. In cases of this kind, either the contradiction is only apparent and the two rules are really coordinated so that each has its own sphere of application and does not encroach on the sphere of application of the other, or else one prevails over the other, i.e., is applicable to the exclusion of the other. I know of no clearer, more certain, or more universally accepted principle than this.

[125] To decide whether a contradiction between two rules is only apparent and how they should be co-related to one another, or to determine which of two contradictory rules applies to the exclusion of the other, is among the most important and most [p91] difficult tasks in the interpretation of legal texts. It is precisely this task which confronts the Court in the present case.

[126] 4. - The Treaty being of later date than the Declarations, it is in the text of the former that we must seek the intention of the Parties in regard to rules previously in force.

[127] In this connection Article 4 of the Treaty seems to me of decisive importance.

[128] This Article, having in its first paragraph formulated the general rule that all disputes with regard to which the Parties are in conflict as to their respective rights shall be submitted for decision to the Permanent Court of International Justice, lays down in paragraph 2 : "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."

[129] It follows, in the first place, that all disputes, without exception, which may be submitted to the Court under the Declarations, may henceforward be submitted to it under the Treaty. Whilst the clause in the first paragraph: "disputes with regard to which the Parties are in conflict as to their respective rights", may possibly extend beyond the classes of disputes in Article 36 of the Statute, it is altogether out of the question that any dispute falling within the classes of Article 36 of the Statute, shall not be included in Article 4 of the Treaty. It also follows that the disputes mentioned in Article 36 of the Statute and therefore forming the subject-matter of the Declarations, are henceforth disputes "included" in Article 4 of the Treaty : "... the disputes referred to above include in particular those...". This amounts to saying that they are disputes to which Article 4 is applicable as well as the other articles of the Treaty which apply to the disputes referred to in Article 4.

[130] Accordingly, the Treaty covers all disputes contemplated in the Declarations and subjects them to its specific rules.

[131] This interpretation, which appears to follow naturally from the text of Article 4, seems to me to be in perfect accord with the intention of the Parties when they concluded their Treaty of conciliation, arbitration and judicial settlement. Both States proposed to adopt a number of pacific methods of "settling all international disputes" ; thus, the system was to be complete and one in which every class of dispute was to receive the treatment best suited to it. Since the disputes mentioned in Article 36 of the Court's Statute are an important part of the disputes contemplated by the Treaty, nothing was more natural than to extend to those disputes the system of rules and [p92] safeguards which the contracting Parties thought necessary or expedient for the attainment of their purpose.

[132] If, for example, they thought that the judicial settlement of a dispute might usefully be preceded by diplomatic negotiations, why should they not have extended this rule to the disputes mentioned in Article 36 ? If it seemed just or opportune in certain cases to give the interested Party a right to object to the method of settlement laid down in the Treaty being employed until a decision with final effect had been pronounced by the competent judicial or administrative authority, it was only natural to apply that rule also to the disputes mentioned in Article 36, whenever those disputes present the features in view of which the rule was adopted.

[133] On the other hand, it was necessary to ensure that any limitation or reservation which the contracting Parties, or one of them, might have attached to their acceptance of the Court's compulsory jurisdiction under Article 36 of the Statute, should not take effect during the current period of the Treaty. For, by excluding from the jurisdiction of the Court certain of the disputes mentioned in Article 36 or by subordinating that jurisdiction to other conditions than those contemplated in the Treaty, the said limitations or reservations would have created a class of disputes not compulsorily subject to pacific settlement, whereas the purpose of the Treaty, as appears *ipsis verbis* in Article 1, was to ensure the settlement of all disputes that might arise between the two States.

[134] It appears evident, therefore, that the rule approved in Article 4, paragraph 2, of the Treaty, as I understand it, namely, as comprising within this Article, and thus making subject to the Treaty, the disputes mentioned in Article 36 of the Statute of the Court, is only a logical consequence of the purpose and plan of this Treaty.

[135] 5. - Since the Treaty covers all disputes referred to in the Declarations, the question arises whether the latter must not be held to have been abrogated by the Treaty.

[136] There was no express abrogation. But it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible, with the previous provisions, or that the whole matter which formed the subject of these latter is henceforward governed by the new provisions

[137] I consider that it would be difficult to resist the argument in favour of tacit abrogation, were it not for the following circumstance.

[138] The Declarations and the Treaty have not the same period of validity, nor an indefinite period. As has already been seen, [p93] the periods of duration of the Declarations and of the Treaty were such that the life of the Declarations continued beyond that of the Treaty. It follows that the coming into force of the Treaty did not entirely do away with the *raison d'être* of the Declarations : this *raison d'être* ceased for so long as the Treaty should be in force ; but it revived as soon as the Treaty should terminate. On the other hand, a treaty whose purpose was to extend and strengthen the peaceful settlement of disputes between the two States cannot be deemed to have intended to set aside, save in so far as was strictly necessary, an agreement which, in a more limited way, pursued the same object. While it is true that once the Treaty had come into force, it left no room for the application of the Declarations, it is also true that it had no need to suppress them.

[139] In these circumstances, it is not the abrogation of the Declarations, but its temporary suspension which we must consider to be the effect of the coming into force of the Treaty. It follows that the expiration of the Treaty eliminated the obstacle standing in the way of the application of the Declarations. The latter, never having ceased to be in force, again became applicable at the same moment as the Treaty terminated, namely March 4th, 1938.

[140] The conclusion is that, at the moment when the Belgian Government's Application was submitted (Jan. 26th, 1938), only the Treaty was applicable. Consequently, the soundness of the objection to the jurisdiction raised by the Bulgarian Government must be appreciated on the basis of the Treaty alone.

[141] 6. - Before proceeding to this examination, it may be well to make clear what are the claims of the Belgian Government against which the objection is directed.

[142] The latter Government formulated its claims in the Application under two heads, A and B. The purpose of the claim under A is to obtain from the Court a judgment declaring that, owing to certain acts, Bulgaria has failed in its international obligations towards Belgium; that under B concerns reparations in respect of these alleged failures. This latter claim which, in the Memorial, is divided into two - letter B relating to restitutio in -pristinum and letter C to reparation of damage sustained - is without importance at the present stage of proceedings.

[143] The alleged failure by Bulgaria to observe its international obligations is indicated under three numbers in claim A : (1) concerns the bringing into effect by the State Mines Administration on November 24th, 1934, of a special artificial tariff for coal supplied to electric power stations ; (2) concerns the judgments rendered by the Regional Tribunal and by the Sofia [p94] Court of Appeal on October 24th, 1936, and March 27th, 1937, respectively; (3) concerns the promulgation of the law of February 3rd, 1936, of which Article 30 (c) establishes a special tax on the distribution of electric current purchased from undertakings not subject to the tax.

[144] It must however be pointed out that complaint is made against the tariff of November 24th, 1934, only because its object is alleged to have been to enable the Municipality of Sofia wrongly to apply the awards of the Mixed Arbitral Tribunal of 1923 and 1925. As complaint is also made against the judgments of the Regional Tribunal and of the Sofia Court of Appeal on the ground that they deprived the Company of the benefit of these awards of the Mixed Arbitral Tribunal, it seems evident that there is here one single alleged breach of Bulgaria's international obligations, consisting at one time of acts of the administrative authorities (1), and at another time of acts of the judicial authorities (2). While making every reservation as to what were the international obligations thus violated by the Bulgarian administrative and judicial authorities, it is therefore possible to regard Nos. 1 and 2 of conclusion A, so far as the Court's jurisdiction is concerned, as one single claim.

[145] On the other hand (3) which relates to an alleged discrimination in the imposition of taxes does not concern the awards of the Mixed Arbitral Tribunal or the obligations resulting therefrom for the Bulgarian Government. It must therefore be dealt with separately even in connection with the Court's jurisdiction.

[146] Thus there are two claims, the first being Nos. 1 and 2 and the second No. 3 of conclusion A. This seems to be in accordance with the statements of the Applicant.

[147] Against the possibility of the Court's giving judgment on these claims, the Bulgarian Government, if I am not mistaken, puts forward three arguments based on the Treaty : the Belgian Government's claims, or at any rate the first of these, are said not to fall within the category of disputes which, under Article 4, are to be submitted to the Court ; the condition laid down by Article 3 is not fulfilled as regards either the first or the second claim ; finally, as regards the second claim, the condition required by Article 1 is lacking.

[148] 7. - It is not easy to say exactly what is the objection which the Bulgarian Government claims to draw from the matter of the dispute before the Court. It would appear, however, that it may be summed up as follows : the right which the Belgian Government denies to the Bulgarian Government is, in reality, the right of Bulgarian courts to try disputes between a Belgian [p95] company that is a concessionaire of public undertakings in Bulgaria, and a Bulgarian Municipality; now this right is inherent in the sovereignty of the State and falls within Bulgaria's exclusive jurisdiction, and the Belgian Government cannot invoke the Treaty of 1931 in order to come before the Court.

[149] If that really is the Bulgarian Government's objection, it seems to me certain that it is not a preliminary objection against the Court's jurisdiction, but a defence on the merits. A preliminary objection is an objection of which the purpose and the effect are to prevent the continuance of proceedings before the Court, without prejudging the question whether the right claimed by the Applicant exists or not. Now it is clear that if the Court gave a decision on the Bulgarian objection, it would in reality be admitting or denying the right claimed by Bulgaria, without having heard the merits.

[150] This objection cannot therefore be upheld, for it is not of the nature of a preliminary objection. It is hardly necessary to add that the Bulgarian Government is quite free to put forward its argument during proceedings on the merits.

[151] 8. - The Bulgarian Government's second complaint is based upon Article 3 of the Treaty, which says : "In the case of a dispute the occasion of which, according to the municipal law of one of the High Contracting 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 Treaty until a decision with final effect has been pronounced within a reasonable time by the competent authority." It has already been said that this complaint is directed against both the first and the second of the Belgian Government's claims. It should, however, be examined separately in respect of each.

[152] A. It is agreed between the Parties that, at the time when the Application was submitted, the Tribunal of first instance and the Sofia Court of Appeal had already adjudicated upon the claims of the Sofia Municipality and the Belgian Company, but that the Court of Cassation with which the Company had lodged an appeal on June 23rd, 1937, did not deliver its judgment until March 16th, 1938 - that is, after the filing of the Application. The Belgian Government does not deny that the judgment was pronounced within a reasonable time.

[153] The Parties agree that the dispute between the Municipality of Sofia and the Belgian Company, which forms the subject of the present dispute between Belgium and Bulgaria, falls within the competence of the Bulgarian authorities.

[154] The Belgian Government does not claim that the Bulgarian Government did not comply with Article 3 of the Treaty in [p96] objecting to the dispute being submitted to the Court. It alleges, however, either that the condition laid down in Article 3 was already fulfilled on January 26th, 1938 ; or that, following denunciation of the Treaty by Bulgaria, Belgium was not obliged to await its fulfilment ; or, finally, that, since the effect of the condition is purely suspensory, it cannot be invoked now that the Court of Cassation has given a decision with final effect.

[155] In my opinion none of these arguments holds.

[156] (a) The contention that the condition required by Article 3 of the Treaty was already fulfilled on January 26th, 1938, was upheld, if I remember rightly, from two points of view. Firstly, it was argued that the matter needed only to have been submitted to the highest national court; it was not necessary that that court should have delivered judgment. Secondly, and with greater force, it was urged that, since the appeal to the Court of Cassation was a remedy of an exceptional nature, it could not prevent the judgment of the Court of Appeal being regarded as the decision with final effect within the meaning of Article 3 of the Treaty.

[157] As regards the first point, irrespective of whether there may be cases in which the rule of international law commonly known as the "local redress rule" is complied with by the mere submission of a case to the highest jurisdiction in the land, I do not see how this plea could be accepted in the face of a treaty text which requires a "decision with final effect". Either the judgment given by the Court of Appeal is such a decision, or the existence of such decision must be awaited. The mere fact of having applied to the supreme jurisdiction does not here carry any weight.

[158] Indeed, the representatives of the Belgian Government relied mainly upon the alleged finality of judgments given by the Court of Appeal.

[159] The question depends, firstly, upon the meaning that is to be attached to the words "decision with final effect" in Article 3 of the Treaty and, secondly, upon the force and effects of judgments given by the Court of Appeal under the municipal law of the country in which those judgments are given. The first matter is a question of treaty interpretation and thus of international law ; the second a question of Bulgarian law.

[160] In order to determine the meaning of the words "decision with final effect", we have to ascertain what the Parties had in view when they laid down the stipulations of Article 3 of the Treaty. In my opinion they wanted to enable the interested State to prevent an international dispute from arising as long as there was a means of removing its cause through a decision by the national authorities. It follows that no "decision with final effect", as required by Article 3, has been [p97] given until the adopted decision can no longer be altered, at any rate so far as concerns the matters capable of leading to an international dispute. A decision which can be amended, cancelled, or

replaced by another is not the decision contemplated by the Parties, whatever colour may be given to it by the municipal law of the country in which it was issued.

[161] It is agreed that, under Bulgarian law as under the law of several other countries, for as long as there is the possibility of an appeal to the Court of Cassation or as long as such appeal is pending, a judgment by an appeal court is one that can be cancelled and replaced by another judgment which, in fact as well as in law, may be absolutely different. Should the Court of Cassation quash the judgment appealed against, the whole case reverts absolutely to the condition in which it stood immediately after the judgment by the lower court; a new case on appeal is heard, involving a re-examination of the facts and of the law, ending in a judgment that may be altogether different from the previous one.

[162] In view of these circumstances, I really do not see what importance can be ascribed, either to the exceptional character given by Bulgarian and other law to the appeal to a court of cassation, for reasons and from considerations which have nothing to do with the question before us; or to the fact that, for similar considerations, the sentence by the Court of Appeal is described as final or given by the last instance; or again, to the fact that the Court of Cassation pronounces only upon questions of law, etc., etc. The one important point is that the judgment by the Court of Appeal, from which appeal is lodged with the Court of Cassation, is a judgment which may be cancelled and replaced by another quite different judgment ; that is exactly the contrary of what the Parties desired when they required a "decision with final effect".

[163] (b) The second argument, namely, that the denunciation of the Treaty by the Bulgarian Government released the Belgian Government from the duty of awaiting the result of the recourse to cassation, is based mainly upon the consideration that, since the Treaty was about to expire, it became impossible to submit the Application.

[164] This argument seems to me no better founded than the first argument. If the Bulgarian Government had the right to denounce the Treaty, it was perfectly natural that the Belgian Government should be rendered incapable of benefiting by it. It is impossible to describe as force majeure what was really only a consequence of the exercise by the Bulgarian Government of its right of denunciation.

[165] True, the representatives of the Belgian Government alluded cautiously to an abuse of right said to have been committed [p98] by the Bulgarian Government when it denounced the Treaty in order to remove from the jurisdiction of this Court the case which the Belgian Government was proposing to submit.

[166] The theory of abuse of right is an extremely delicate one, and I should hesitate long before applying it to such a question as the compulsory jurisdiction of the Court. The old rule, a rule in such complete harmony with the spirit of international law, *Qui iure suo utitur neminem laedit*, would seem peculiarly applicable. The Bulgarian Government was entitled to denounce the Treaty and was sole judge of the expediency or necessity of doing so.

[167] The situation might be somewhat different if the Bulgarian Government, being free to denounce

the Treaty at any time, had chosen the particular moment at which it had been informed of the Belgian Government's intention to apply to the Court. But that is not the case. At the time when it learnt of the Belgian Government's decision, the Bulgarian Government had only a few days in which to denounce the Treaty under Article 37, Nos. 2 and 3, if it did not wish to be bound for a further period of five years.

[168] Finally, the Treaty once expired, the Belgian Government was still able to apply to the Court under the Declarations. And the Belgian Government, by basing its application not only on the Treaty but also on the Declarations, showed its belief that those Declarations empower the Court to adjudicate on the present question. There was therefore no *periculum in mora*.

[169] (c) There remains only the argument that the local redress rule, being of a suspensory character, can no longer be invoked now that the Court of Cassation has delivered its judgment.

[170] I do not deny that the so-called local redress rule, when invoked by one of the parties to a case, may on occasions simply serve to suspend proceedings ; this will probably be the case if the rule is invoked as an objection to the merits.

[171] But in this case, the Court is not confronted with a rule of common international law; it is dealing with a specific and formal provision, Article 3 of the Treaty, which it is required to apply. And this Article grants to the interested Party the right to "object to the matter in dispute being submitted" to the Court. It is therefore absolutely certain that we are concerned with a condition governing application to the Court and that the condition has to be fulfilled at the time when the Court is applied to.

[172] The objection by the Bulgarian Government is therefore well-founded in respect of the first claim of the Application. [p99]

[173] B. On the other hand, the objection appears to me to be ill-founded in respect of the second claim in the Application, viz., the promulgation of the law of February 3rd, 1936, imposing a special tax on the distribution of electric power purchased from concerns not subject to the tax.

[174] In reply to the Belgian Government's objection that there is no remedy against the acts of the legislative authority, the representatives of the Bulgarian Government merely declared that there is such remedy against the application of the law.

[175] Making every reservation as to whether the mere promulgation of a law like the Bulgarian law of February 3rd, 1936, can constitute a breach of international obligations as claimed by Belgium, there is no denying that the Application refers to the promulgation of the law, and to its promulgation only. It is certain, however, that Bulgarian law, like the laws of nearly all, if not all, countries, knows of no remedy against promulgations of a law. Article 3 of the Treaty does not therefore apply.

[176] 9. - The third complaint of the Bulgarian Government is based on Article 1 of the Treaty, according to which only disputes "which it has not been possible to settle by diplomatic means" shall be submitted for settlement by the different methods laid down in the Treaty.

[177] The Bulgarian Government admits that, in regard to the points forming the subject of the Application's first claim (submission A (1) and (2)), there were diplomatic negotiations and that they led to no result ; this complaint therefore does not concern the said claim.

[178] With regard to the second claim (submission A (3)), the Bulgarian Government declared in its Memorial that the claim relating to the text established by the law of 1936 was an entirely fresh one and that no attempt had ever been made to settle it by the diplomatic means referred to in Article 1 of the Treaty.

[179] The Belgian Government's Supplementary Memorial appears to admit that there were no diplomatic negotiations on this point. It merely replies that, according to the Court's jurisprudence, the Belgian Government needed only to determine, after the failure of its representations made in regard to the decisions given by the Bulgarian courts, that it was useless to enter into special negotiations regarding the complaint based on the fiscal law of 1936, a complaint notified to it by the Company "subsequently".

[180] At this point, therefore, it could be taken as established that the Belgian Government's second claim had not formed the subject of diplomatic negotiations.

[181] During the oral proceedings the Belgian Government's Agent reverted to this point and said that, in the course of the many [p100] diplomatic representations made by his Government, these secondary grounds of complaint had also been mentioned, and he offered to produce evidence of this fact if the Court thought it desirable.

[182] In view of the summary character of the procedure mentioned in Article 62 of the Rules and the formal provisions contained in Nos. 2 and 3 of that Article with regard to evidence, I doubt very much indeed whether the Court could have accepted the offer made in the circumstances referred to above by the Agent for the Belgian Government. In any event I can only state that the evidence was not furnished and that the Belgian Government's claim does not fulfil the condition required by Article 1 of the Treaty.

[183] 10. - My opinion may be summarized as follows.

[184] The entry into force of the Belgo-Bulgarian Treaty of June 23rd, 1931, suspended for the whole term of the Treaty, namely, from February 4th, 1933, until February 4th, 1938, the applicability of the Agreement resulting from the Belgian and Bulgarian Declarations accepting the Court's compulsory jurisdiction in accordance with Article 36 of its Statute.

[185] At the time when the Belgian Government filed its Application, the Treaty was still in force. It follows that the Application was required to fulfil the conditions laid down in the Treaty and that it is on that basis that we have to appraise the justice of the preliminary objection to jurisdiction lodged by the Bulgarian Government.

[186] In as much as that Government pleads that the first claim of the Belgian Government

(submission A (1) and (2)) does not fulfil the condition laid down in Article 3 and that the second claim (submission A (3)) does not fulfil the condition laid down in Article 1 of the Treaty, the objection is well-founded. The Court should have accepted it and disclaimed jurisdiction.

[187] I need scarcely add that the Belgian Government could have submitted a fresh application based this time upon the Belgian and Bulgarian Declarations accepting the Court's compulsory jurisdiction, Declarations that became again applicable in relations between the two States from February 4th, 1938, onwards.

(Signed) D. Anzilotti. [p101]

Dissenting Opinion by M. Urrutia.

[Translation]

[188] The Application of the Belgian Government against the Bulgarian State in regard to the Electricity Company of Sofia and Bulgaria declares that that Government, for the purposes of proceedings before the Court, relied upon:

- (1) the declarations of adherence made by Belgium and Bulgaria to the optional clause accepting as compulsory the jurisdiction of the Court, which declarations were respectively ratified on March 10th, 1926, and August 12th, 1921 ;
- (2) the Treaty of conciliation, arbitration and judicial settlement concluded between the two countries on June 23rd, 1931.

[189] In the Statement of the Law contained in the Belgian Memorial (p. 18), the Court's jurisdiction was derived in the first place from Article 4 of the said Treaty of conciliation, arbitration and judicial settlement, but the Memorial added: "In addition, if a further source were necessary, the Belgian Government bases the jurisdiction of the Permanent Court of International Justice upon the declarations by which Belgium and Bulgaria adhered to the optional clause of the Statute of the Court", etc.

[190] In the Statement of Facts in the same Memorial (p. 17), reference is made to the note sent by the Belgian Minister in Sofia to the Bulgarian Minister for Foreign Affairs on June 24th, 1937 (Annex 56 of the Belgian Memorial), in which the Belgian Minister notified the intention of his Government to submit the dispute to the Court, "the present dispute falling within the class of those which Articles 4 and 6 of the Treaty of conciliation concluded between Bulgaria and Belgium on June 23rd, 1931, permit to be submitted unilaterally to the Permanent Court of International Justice", etc.; in brackets these words are added : "(whose compulsory jurisdiction Bulgaria moreover accepted under the optional clause on August 27th, 1921)".

[191] The Belgian Government's Additional Memorial states that the Treaty of conciliation, arbitration and judicial settlement is, in the second place, the basis of the Court's jurisdiction. The Statement of Law in the Memorial of the Bulgarian Government introducing its preliminary objection implies that the Bulgarian Government also understood the Belgian Application in this sense.

[192] It would appear that the first question to be asked in order that the Court may establish its jurisdiction is whether the Bulgarian Government's objection is to be settled on the basis [p102] of the Treaty already several times mentioned or on that of the optional clause or on the two texts conjointly.

[193] Me. Rolin, Counsel for the Belgian Government, speaking in Court in the morning of March 1st, 1939, expressed his views on this question and concluded as follows :

"Until February 3rd, 1933, our relations were governed by the optional clause, subject to the conditions specified in our respective declarations of acceptance.

From February 3rd, 1933 - the date of the coming into force of the Treaty of 1931 - till February 3rd, 1938, our relations were governed by that Treaty.

From February 3rd, 1938, up to the present time, our relations are again governed by the optional clause."

"It seems rather strange that, after the written proceedings and after the arguments which you have heard, you should be invited to decide as to your jurisdiction in a single dispute between two States on the basis of two series of documents which have been examined in succession, just as if there were two clauses in force during the said period between Belgium and Bulgaria having to be applied in a separate manner, two documents unrelated to one another, two systems of rules to which you are invited to refer in succession... It seems to me preposterous to suppose that it was the intention of Belgium and Bulgaria to create another additional system which would be in force during the same period as the optional clause that already bound us, and would have cumulative effect."

[194] At the afternoon hearing of the same day, Me. Rolin modified his earlier opinion and expressed another view to the effect that "in this second intermediate period - during which Belgium filed her Application - the Court should take into consideration the optional clause together with any amendments to it effected by the Treaty between Belgium and Bulgaria" (Exposés oraux, Distr. 4225).

[195] M. Altinoff, Agent for the Bulgarian Government, disputed the arguments adduced by Me. Rolin in his first statement and, according to the Bulgarian Agent, the Treaty of arbitration, conciliation, etc., between Belgium and Bulgaria makes no change so far as concerns judicial settlement and leaves the previous situation wholly intact.

[196] In order to decide this question, the Court is not obliged to adopt the legal ground taken up by either Party, but is quite free to reach a decision in accordance with its own judgment, even if both Parties defend the same legal argument, should the Court consider that that argument lacks foundation.

[197] It is not only the right, but the duty of the Court ex officio to make sure of its jurisdiction, that is of its power to take [p103] cognizance of a case in accordance with the texts governing the said jurisdiction (Art. 53 of the Statute).

[198] Bulgaria's declaration accepting the jurisdiction of the Court under Article 36 of the Court's Statute was signed on July 29th, 1921; it was ratified on August 12th, 1921, and contains no reservation, but only the general condition of reciprocity.

[199] The declaration by Belgium is limited to fifteen years in any disputes arising after the ratification with regard to situations or facts subsequent to this ratification, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement.

[200] The Belgian declaration was ratified on March 10th, 1926, which date fixes the entry into force as between Belgium and Bulgaria of the aforesaid declarations, under the reciprocity clause.

[201] The Treaty of conciliation, arbitration and judicial settlement signed between Bulgaria and Belgium on June 23rd, 1931, was ratified on February 4th, 1933. It was denounced on August 3rd, 1937, and expired on February 4th, 1938, in accordance with Article 37.

[202] The adherence of the two Parties to Article 36 of the Statute of the Court is equivalent in law to an international agreement between them within the limits fixed by the reservations in the Belgian declaration. The undertaking could be modified either by extending or restricting the obligations, or by supplementary provisions embodied in some later agreement.

[203] The said Treaty between Belgium and Bulgaria defined and amplified the mutual undertakings following from their acceptance of Article 36 of the Court's Statute through the introduction of fresh provisions for judicial settlement, through the creation of a supplementary legal system in relation with the said settlement.

[204] The reservation *ratione temporis* contained in the Belgian declaration cannot be invoked during the current period of the 1931 Treaty. It is surely out of the question to apply simultaneously, in the same dispute and by the same court, one treaty stipulation excluding certain disputes from judicial settlement, and another stipulation providing for them. One stipulation or the other must prevail. In the present case it is the Treaty, which is a later law between the Parties, a special law, the text of which is so perfectly clear that there can be no choice of construction, still less any confusion.

[205] Under Article 3 of the said Treaty, the High Contracting Parties agreed to establish certain special conditions before [p104] an application could be submitted, to the Court. This Article, which is Article 31 in the General Act of conciliation, arbitration and judicial settlement adopted by the Assembly of the League of Nations on September 26th, 1928, laid down an express condition governing an appeal to the compulsory jurisdiction of the Court as accepted in the declarations relating to that jurisdiction in accordance with Article 36 of the Statute. That condition, which appears in one form or another in the many treaties which followed the General Act, means that the High Contracting Parties, by a solemn and positive act, accept that principle of international law concerning exhaustion of internal remedies, a principle already generally acknowledged as one of those to which paragraph 3 of Article 38 of the Court's Statute refers, and which the Court recently confirmed, so happily in its recent judgment in the case of the Panevezys-Saldutiskis Railway between Estonia and Lithuania.

[206] The application of the ordinary rule of international law concerning exhaustion of local remedies, which in my opinion, is binding in connection with the introduction of any application whatever to the Court under the optional clause, is in the present case altogether inevitable, arising as it does out of the express stipulation of a treaty. Article 38 of the Court's Statute mentions as the first of the sources of law to be applied :: international conventions establishing rules expressly recognized-by the contesting States.

[207] Accordingly, for as long as the 1931 Treaty was in force, Article 3 is the Article which must govern the jurisdiction of the Court in the case of an application filed by one of the High Contracting Parties. If the Parties, by merely invoking the acceptance of the Court's jurisdiction contained in their declarations of adherence, could set aside this fundamental clause in the Treaty, the latter would have a purely academic value and no practical efficacy whatever.

[208] Article 7 of the 1931 Treaty also inserted a new and additional clause connected with the judicial settlement of any dispute between the High Contracting Parties. It was provided that, if conciliation failed, a certain time must elapse before an application could be submitted to the Court.

[209] Articles 33 and 34 of the Treaty contain further provisions concerning judicial settlement.

[210] The Treaty established a whole legal system supplementing and determining the exercise of the Court's compulsory jurisdiction as accepted by the Parties. The latter did not forget their declarations of adherence, and Article 4 of the Treaty expressly provides that the disputes to which it refers include [p105] in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice. Article 31 of the Treaty also refers to the rules in regard to the substance of the dispute indicated in Article 38 of the Statute. It may therefore be concluded that the Parties intended to incorporate the general system of law arising out of the acceptance of the Court's compulsory jurisdiction within another system more precise and more comprehensive and which the Parties no doubt thought best adapted to their mutual interests.

[211] The Treaty cannot be said to have cancelled, abrogated or suspended the legal effects of the declarations, but it made them subject to such conditions that, during the term of the Treaty, the Court's jurisdiction may only be exercised in accordance with those conditions.

[212] If it were to be allowed that two provisions, governing the jurisdiction of the Court in a different and even a contrary manner, were simultaneously applicable, it would follow that the Court can possess jurisdiction in a certain case under one of these provisions, while possessing no jurisdiction under another. Such a situation seems to me hardly permissible from the legal point of view, nor, I think, would it accord with the Wish of the Parties as expressed in the text of the instruments by which they are bound.

[213] If it is inadmissible under municipal law that the jurisdiction of the Court should be governed by one law which establishes its jurisdiction and by another law which excludes it, it is equally impossible to contemplate a parallel situation in international law.

[214] Adherence to Article 36 of the Court's Statute by several States, provided for in that Article, was a long step towards what is called compulsory arbitration. This provision to some extent realized the hopes of several countries which wished the compulsory jurisdiction of the Court to be incorporated within the Statute itself. It was decided, however, that this general system was to be supplemented and completed by multilateral or bilateral agreements exactly defining the obligations of the parties. It was this purpose which inspired the recommendations of the Assembly of the League of Nations adopted on October 2nd, 1924, and September 25th, 1926, and, finally, the drafts of the General Act of conciliation, arbitration and judicial settlement and of the model conventions annexed thereto, voted by the Assembly of 1928.

[215] The question raised in the case now before the Court involves a legal problem of great importance to the proper understanding [p106] of the relations existing between the optional clause and the said conventions, and the Court's decision will certainly be very carefully examined by all the signatory States.

[216] On January 25th, 1938, the day on which the Belgian Application was filed with the Court, the Treaty of 1931 was still in force, and the provisions of that Treaty concerning judicial methods must determine the jurisdiction of the Court in this case.

[217] In my opinion, Belgium could not submit her Application, for as long as the said treaty was in force, without taking account of its provisions.

[218] Bulgaria, too, in her preliminary objection, was bound to discuss the jurisdiction of the Court in the light of the treaty provisions.

[219] The Bulgarian Government bases its objection to the jurisdiction of the Court on Article 3 of the said Treaty. The Belgian Government, both in its written memorials and in its oral pleadings, accepted the Bulgarian Government's objection as an objection to the jurisdiction of the Court, which it in fact is, since the said jurisdiction emanates from the text of the Treaty.

[220] The above-mentioned Article 3 lays down the following conditions in order that one of the Parties may object to the submission of an application to the Court:

1. If the dispute is one the occasion of which, according to the municipal law of one of the High Contracting Parties, falls within the competence of the judicial or administrative authorities of the objecting Party.
2. If the dispute has not been settled by means of a decision with final effect pronounced within a reasonable time by the competent authority.
3. If the applicant Party has not notified the other Party of its intention within a period of one year from the date of the aforementioned decision.

[221] The present dispute appears to me to fall within the competence of the Bulgarian judicial authorities for the following reasons.

[222] The Belgian Government recognized the jurisdiction of the Bulgarian courts in the Belgian Minister's letter to the Bulgarian Prime Minister dated April 22nd, 1937 (Bulgarian Memorial, No. 37).

[223] The Electricity Company of Sofia also recognized that jurisdiction, as is confirmed by the Belgian Minister in the afore [p107] said note, and also by the very fact of having instituted proceedings before the courts.

[224] The Agent for the Belgian Government acknowledged that jurisdiction both in the written memorials and in the oral pleadings. The Belgian Government's Additional Memorial contains this important statement : "Moreover, far from the Belgian Government having claimed to withdraw from the examination of the Bulgarian courts a dispute which fell legally within their jurisdiction, it is a fact that at the time when the Application was filed, two Bulgarian instances had delivered final judgments."

[225] According to universally admitted rules of international law, "property rights and contractual rights depend on municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals". That is a quotation from the Court's last judgment (Panevezys-Saldutiskis Railway).

[226] The Court also laid down in that judgment that the question whether the courts of a country do or do not possess jurisdiction in a given case depends upon the law of that country and that on that matter only the said courts can give a final decision.

[227] There is no need to enter into the merits of this dispute in order to appreciate what is already evident, namely that the rights in question are contractual rights between the Municipality of Sofia and a Belgian electricity company.

[228] I also consider that Belgium filed her Application before the Bulgarian courts had delivered a final judgment, for these reasons.

[229] The judgment by the Court of Cassation might have quashed the judgment of the Court of Appeal and have referred the case for re-examination by two new courts.

[230] The Sofia Electricity Company lodged an appeal with the Court of Cassation for the very purpose of securing a fresh examination of the dispute by the Bulgarian courts.

[231] The Belgian Government's Memorial itself admits by implication that this appeal to the Court of Cassation was its last remedy (pp. 20 and 36 of the Belgian Memorial). The Belgian Memorial concludes as follows :

“May it please the Court, subject to any fuller submissions that may be made in the course of the

proceedings,

A. To declare that the State of Bulgaria has failed in its international obligations,

1.

2. By reason of the above-mentioned judgments of the District Court and of the Court of Appeal of Sofia and of the judgment of the Court of Cassation given on March 16th, 1938...". [p108]

[232] The argument whereby an appeal to a court of cassation does not prevent the application of the local redress rule would, have as its result that the same dispute might be dealt with simultaneously by a municipal tribunal and an international court.

[233] As regards reasonable time-limits for the delivery of the final judgment by the national courts, the Belgian Government has made no observations and could not do so in its Application, because at the time when it was filed it was still not known when the Court of Cassation would deliver its judgment. For the rest, that judgment was given within less than nine months.

[234] The second part of Article 3 of the Treaty contains an undertaking by the State which proposes to submit an application to notify its intention within one year from the date of the above-mentioned decision. As there had been no decision with final effect, there could be no such notification. The notification contained in the note by the Belgian Legation in Sofia addressed to the Bulgarian Prime Minister and Minister for Foreign Affairs on June 24th, 1937, refers to the judgment delivered by the Sofia Court of Appeal on March 27th, 1937.

[235] With regard to paragraph 4 of Article 37 of the Treaty, I think that the words "proceedings pending at the expiration of the current period of the Treaty shall be duly completed" refer to proceedings validly instituted, that is to say that paragraph 4 of Article 37 refers to proceedings instituted in conformity with Article 3.

[236] The above considerations have led me to conclude that the preliminary objection to the Court's jurisdiction lodged by the Bulgarian Government and based on the Treaty of conciliation, arbitration and judicial settlement, concluded between Belgium and Bulgaria on June 23rd, 1931, is well-founded.

(Signed) Urrutia. [p109]

Dissenting Opinion by Jonkheer Van Eysinga.

[Translation]

[237] The Belgian Application relies on the Bulgarian and Belgian declarations of July 29th, 1921, and September 25th, 1925, accepting the jurisdiction of the Court under Article 36 of the Statute and also on the Treaty of conciliation, arbitration and judicial settlement of June 23rd, 1931.

[238] The adduction of these two sources of jurisdiction confronts the Court with the problem of

concurrent sources of jurisdiction, a problem which became of practical importance more especially when the jurisdiction of the Court under Article 36 of the Statute was added to that of other tribunals provided for in already existing treaties. The importance of the problem was pointed out when the Court first entered upon its duties at the beginning of 1922 by van Vollenhoven in an article published in that year in the *Rechtsgeleerd Magazijn* and reproduced in the second volume of his *Verspreide Geschriften* (1934, pp. 559 et sqq.). Afterwards, the problem was further complicated by the conclusion of treaties of judicial settlement subsequent to acceptance of the Court's jurisdiction under Article 36 of the Statute and by the General Act of Geneva of September 26th, 1928. In these circumstances it is understandable that the problem should have attracted the attention of several other writers.

[239] In the present case it will suffice to examine the question what is the precise relation, as regards the Court's jurisdiction, between the Bulgarian and Belgian declarations under Article 36 of the Statute on the one hand, and the Treaty of 1931 on the other.

[240] As the question here concerns the foundation of the jurisdiction of the Court, it is for the latter to form its own opinion on the subject.

[241] The legal link resulting from acceptance of the Court's compulsory jurisdiction under Article 36 of the Statute came into existence on March 10th, 1926, when the Belgian declaration, which was some years later than the Bulgarian, came into force. By the operation of reciprocity, the only condition made in the Bulgarian declaration, the two conditions *ratione temporis* made in the Belgian declaration - the dispute must arise after March 10th, 1926, and in regard to situations or facts subsequent to that date - also hold good for Bulgaria. The same applies as regards the final condition made in the Belgian declaration : "except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement". [p110]

[242] After the changes in the system of pacific settlement of international disputes brought about by the activity of the League of Nations and particularly by the General Act of Geneva and the draft bilateral treaties attached to that Act, Bulgaria and Belgium made another effort with a view to the pacific settlement of any disputes between them by signing the Treaty of 1931 which came into force on February 4th, 1933. This Treaty in fact involves a very considerable extension of that which was provided for by the Belgian and Bulgarian declarations under Article 36 of the Court's Statute.

[243] Whereas the Bulgarian and Belgian declarations had in view the future legal disputes mentioned in Article 36 of the Statute, the Treaty of 1931 covers "All [future] disputes with regard to which the Parties are in conflict as to their respective rights" (Art. 4, para, 1), a conception which, according to paragraph 2 of this Article, covers more than the legal disputes mentioned in Article 36 of the Statute. And whereas the Belgian and Bulgarian declarations provided only for recourse to the Court, the Treaty of 1931 is more elastic and provides in Articles 5 to 7 three other methods for the pacific settlement of justiciable disputes: conciliation followed by arbitration, arbitration alone, and conciliation followed by a judicial settlement, while only if one of these three methods were not adopted would the Court alone decide the dispute.

[244] Moreover, the Treaty of 1931 is not restricted to the pacific settlement of legal disputes in the

broad sense indicated in Article 4. The Treaty also provides for the pacific solution of "[future] disputes of every kind which may arise between the High Contracting Parties". In so far as such disputes are non-justiciable, they are all, without exception, to be referred to conciliation (Arts. 8-23) and if need be to arbitration (Arts. 24-31).

[245] The condition made in the Belgian declaration that a future dispute must arise "in regard to situations or facts subsequent to ratification of the declaration" has disappeared in the Treaty of 1931 ; on the other hand, recourse to diplomacy (Art. 1) and to the national administrative or judicial authorities (Art. 3) must be exhausted before the Parties can appeal to one of the procedures provided for in the Treaty; the two last conditions, which are new, are perfectly intelligible having regard to the very great extension of the system of pacific settlement of international disputes represented by the Treaty of 1931.

[246] It would seem already to follow, from the foregoing comparison between the Bulgarian and Belgian declarations and the articles of the Treaty of 1931, that the two countries, in concluding the Treaty, intended to develop very considerably the system for the pacific settlement of any disputes between them. And, with regard more particularly to justiciable disputes, the [p111] two countries not only extended the scope of this category of disputes but also modified the method for their pacific settlement.

[247] The new scope imparted by the two countries to the pacific settlement of any disputes between them is also apparent from the preamble to their Treaty of 1931. In this preamble, the two High Contracting Parties refer to "the recommendation of the Assembly of the League of Nations in its Resolution of September 26th, 1928, that all States should conclude conventions for the pacific settlement of international disputes", and they consider "that the faithful observance, under the auspices of the League of Nations, of methods of pacific settlement renders possible the settlement of all international disputes". It seems difficult to imagine that two States who, animated by this spirit, conclude a new agreement which carries much further the development of the system for the settlement of their disputes, should not have intended to apply the new agreement and the new agreement only so long as it remained in force.

[248] Moreover, the Belgian declaration of September 25th, 1925, which, as has been stated, also holds good for Bulgaria, explicitly provides for such a situation when it concludes with the words: "except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement". It follows from this conclusion of the Belgian declaration that that declaration is intended to be subsidiary; it is not to apply when and in so far as another method of pacific settlement has been established, and as has been explained above, the Treaty of 1931 does in fact establish another method of pacific settlement for the legal disputes contemplated by the Bulgarian and Belgian declarations.

[249] One is struck by the lack of consistency in the manner in which the problem of the simultaneous existence of different sources of the Court's jurisdiction has been envisaged on the Belgian side in this case.

[250] The letter of the Belgian Minister in Sofia of June 24th, 1937, in which it is proposed by

Belgium that the dispute should be settled by the International Court, is based only on the Treaty of 1931. The letter only refers in parenthesis to the Bulgarian declaration of 1921 and not to the Belgian declaration which it would have been necessary to do - and not in parenthesis - if the Belgian Government had intended to found its proposal on the two declarations.

[251] On the other hand, the Belgian Application adduces both the declarations under Article 36 of the Statute and the Treaty of 1931. Both Belgium and Bulgaria proceed with their arguments on these lines but without clearly stating the problem of the concurrent sources of jurisdiction. The calm was broken when Counsel for the Belgian Government, on the morning of [p112] March 1st, said that the Treaty of 1931 alone should be applied during the period of its existence (Feb. 4th, 1933, to Feb. 4th, 1938) and that only before and after that period were the Bulgarian and Belgian declarations applicable - in other words, he reverted to the precise attitude of the Belgian letter of June 24th, 1937. In the afternoon the Belgian Counsel felt obliged to revert to the standpoint of the Belgian Application which, finally, was vigorously supported, without however convincing me, in the Bulgarian Agent's oral reply. It is however just possible that there may be a shade of difference between the standpoint of the Belgian Counsel and that of the Bulgarian Agent.

[252] This inconsistency in the Belgian attitude with regard to a problem which is fundamental in the present case is especially surprising because it has always been the practice of Belgium, in making the declaration of September 25th, 1925 - which was subsequently adopted by many other governments - as well as in adhering to the General Act and in signing a large number of treaties with or without the second condition *ratione temporis* (in regard to situations or facts subsequent to ratification) of the 1925 declaration, to be perfectly plain and precise.

[253] To try to apply at one and the same time two systems the second of which was adopted precisely in order to modify the first seems a difficult thing to do and one which must necessarily lead to results which in themselves show the inconsistency of such an attempt. I will point out one of these results. The second condition *ratione temporis* (in regard to situations or facts subsequent to ratification) of the Belgian declaration applies with regard to the legal disputes enumerated in Article 36 of the Statute. If one seeks to apply both the Belgian declaration and the Treaty of 1931, this condition remains applicable for the legal disputes of Article 36 of the Statute but is not so for the other legal disputes covered by Article 4 of the Treaty. Is it possible to imagine that the two countries intended this?

[254] It follows from the foregoing that the jurisdiction of the Court in this case, which began when the Treaty of 1931 was in force, must be envisaged solely in the light of that Treaty.

[255] The Belgian Application, setting aside point B, asks the Court to declare that Bulgaria has failed in her international obligations as the result of three distinct actions on the part of her administrative, judicial and legislative authorities. Bulgaria denies the alleged failure, and her chief argument is that the three actions in question fall solely within the domestic [p113] jurisdiction of Bulgaria and are therefore outside the jurisdiction of the Court, and the latter is asked by Bulgaria to give judgment to this effect. Besides this ground for the preliminary objection, Bulgaria puts forward

three other grounds which are all included in her one objection to the jurisdiction. It is not easy to appreciate the precise intention of the Bulgarian Memorial which also speaks of the question of admissibility as well as that of jurisdiction. In this Note the Bulgarian Memorial is regarded as presenting a single preliminary objection to the jurisdiction which really consists of four objections, two of which are in the nature of objections to the admissibility of the Application.

[256] In the first place, Bulgaria objects that the Belgo-Bulgarian dispute has not arisen in regard to situations or facts subsequent to March 10th, 1926, and that consequently the Court has no jurisdiction. Since this objection is based on the text of the Belgian declaration of September 25th, 1925, and not on the Treaty of 1931, which does not contain this condition *ratione temporis*, the Court cannot entertain it.

[257] Secondly, Bulgaria - this time on the basis of the Treaty of 1931 - adduces the non-exhaustion of local remedies, to the exhaustion of which Article 3 of the Treaty of 1931 subordinates the institution of proceedings. Here again the Bulgarian Memorial speaks of lack of jurisdiction, since if the Court accepted the Bulgarian argument, Belgium would not be in a position to return to the Court on the basis of the Treaty of 1931 which ceased to be effective on February 4th, 1938. But since Belgium would in that case be entitled to bring a suit on the basis of the Bulgarian and Belgian declarations of 1921 and 1925, this is an objection as to the admissibility of the application and it has been so described more than once by the Bulgarian representative.

[258] It is common ground that the subject of the dispute between the two States, in so far as A, Nos. 1 and 2, of the Belgian Application is concerned, is the same as the subject of the dispute between the Belgian Company and the Municipality of Sofia, and that, accordingly, Article 3 of the Treaty of 1931 applies. It is also common ground that on March 27th, 1937, the Bulgarian courts had adjudicated in first instance and on appeal and that the Bulgarian Prime Minister, on August 3rd, 1937, stated that the Bulgarian courts had already had occasion to give their decision. But it is also true that the Belgian [p114] Company on June 23rd, 1937, appealed to the Court of Cassation and that the Belgian Government's Application was filed with the Court on January 26th, 1938, that is to say before the Court of Cassation had adjudicated, which it did on March 16th, 1938, rejecting the appeal in its entirety.

[259] On behalf of Belgium it has been said that the expression "decision with final effect" in Article 3 of the Treaty of 1931 does not cover the exceptional case of an appeal in cassation. In this connection it may however be asked why the Belgian Company defends its rights so energetically: for the very reason that it considers them to have been infringed. And why does the Treaty of 1931, like so many other treaties of the same kind, stipulate in Article 3 the condition respecting exhaustion of local remedies? Because the contracting Parties did not intend that an international court should adjudicate before the municipal courts had had an opportunity of redressing the alleged breach of the law. In that case it does not seem to be possible to exclude from these municipal courts the Court of Cassation whose sole or in any case main task is precisely to ensure that the law has not been

violated.

[260] Accordingly, the final decision of the Bulgarian municipal courts had not been given when the Belgian Application was filed. It was given some weeks later, on March 16th, 1938. What would now be the situation if the Court had upheld the Bulgarian objection as to admissibility? The Belgian Government might then at once re-submit its Application on the basis of the declarations under Article 36 of the Statute, since by then the remedies of Bulgarian municipal law would have been exhausted more than a year previously. In these circumstances it seems that it would be a pure formality to uphold the objection based on the local remedies rule, at a moment when these remedies have long been exhausted, and on the ground that at an earlier moment they had not yet been exhausted.

[261] It has been said that nevertheless, as long ago as August 3rd, 1937, the Bulgarian Government opposed the submission of the dispute to the Court until a final decision had been rendered by the Bulgarian courts. Is that true? What the letter of the Bulgarian Prime Minister of August 3rd, 1937, says is that the Bulgarian courts have exclusive jurisdiction. Bulgaria does not want the Hague Court either before or after the exhaustion of local remedies. But since Belgium had said that she intended to refer the case to the Court under the Treaty of 1931, Bulgaria replies by adducing Article 3 of that Treaty - which she immediately afterwards denounced - but she does so in terms which leave no doubt that she does not oppose the submission of the case to the Hague Court before the remedies afforded by the local courts have been exhausted - which indeed [p115] had already given their decision according to the letter itself - but the submission of the case to the Court at all. Accordingly, the special agreement proposed by Belgium was out of the question. That, it seems to me, is the meaning of the Bulgarian letter of August 3rd, 1937.

[262] It follows from the foregoing that the objection consisting in the non-exhaustion of local remedies should not be accepted by the Court.

[263] Bulgaria objects in the third place that the Belgian Application cannot be entertained in so far as it asks the Court to say that the State of Bulgaria has failed in its international obligations by the promulgation of the law of February 3rd, 1936, of which Article 30, paragraph C, establishes a special tax on the distribution of electric power purchased from undertakings not subject to tax.

[264] The law of 1936 remained outside the scope of the disputes upon which the Court of Cassation adjudicated as the ultimate Bulgarian court of appeal, and the Belgian Government was informed of the grievance arising out of this law only after the failure of its intervention in regard to the decisions rendered by the Bulgarian courts.

[265] The Bulgarian Memorial gives two reasons why the Belgian Application is, in its contention, inadmissible in so far as concerns the law of 1936.

[266] In the first place this Belgian claim, it is said, never formed the subject of efforts to reach a settlement through diplomatic channels as provided in Article 1 of the Treaty of 1931 upon which the

Belgian Government founds the jurisdiction of the Court. On this point the Belgian attitude is not quite consistent and it is to be supposed that there are reasons why, on the Belgian side, it was preferred not to produce proof that diplomatic methods had in fact been exhausted. However that may be, the Belgian Agent, at the hearing on March 1st, 1939, concluded by saying that he was in a position to produce proof that diplomatic negotiations had been unsuccessfully tried. Accordingly the Belgian Agent definitely offered to produce proof but left the Court to decide whether he should do so or not. In these circumstances it seems difficult to draw any conclusion detrimental to Belgium from the non-presentation of the proof offered.

[267] In the second place, according to the Bulgarian Memorial, the Belgian Company had not had recourse to any local means of redress with regard to the claim respecting the law of 1936. The Bulgarian Memorial says on this subject that there was not even a dispute in the legal sense, so that Belgium did not observe Article 3 of the Treaty of 1931 which requires not [p116] only that there must be a dispute falling within the competence of the Bulgarian judicial or administrative authorities but also that there must be a decision with final effect given by these authorities, in order to give rise to a dispute between the two States under the Treaty of 1931.

[268] In this connection it should be observed that it has not been established that there exist any judicial or administrative authorities, within the meaning of Article 3 of the Treaty of 1931, to which the Belgian Company could have had recourse with a view to securing the modification of the law of 1936. Apart from this however the dispute in this case is not one in which Belgium has taken up the claim of its national against the Bulgarian authorities, but a dispute in which Belgium directly impugnes a legislative act of the State of Bulgaria. And, to use terms borrowed from the Court's jurisprudence, a dispute, a disagreement or a divergence of opinions on a point of law or of fact - a contradiction or opposition of legal views or interests - exists as soon as one of the governments concerned states that the attitude adopted by the other government conflicts with its own views. (Judgment No. 2 in the Mavrommatis case, p. 11 ; Judgment No. 6 in the case concerning certain German interests in Upper Silesia, p. 14)

[269] It has been said that Bulgaria objects that the Belgian Government's claim respecting the law of 1936 is inadmissible on the ground that the claim did not form the subject of a dispute between the Governments and prior to the filing of the Belgian Application. Apart from the fact that this question could only have been cleared up if the Belgian Agent had produced the proof which he had offered regarding the exhaustion of diplomatic methods, it should be observed that, as appears from what has already been said, the Bulgarian Government did not raise this objection in its Memorial. In their oral statements, the Bulgarian Agent and Counsel also adduced a number of arguments in addition to the two arguments contained in the Bulgarian Memorial, but it is unnecessary here to dwell on these additional arguments which include the argument which dominates the whole attitude taken up by Bulgaria in this case and which will be dealt with at the end of this Note, namely that legislative acts fall within the exclusive jurisdiction of Bulgaria. But the argument that there was no dispute between the two Governments before the filing of the Belgian Application is not to be found in the additional arguments any more than in the Bulgarian Memorial. [p117]

[270] I now come to the fundamental preliminary objection to the jurisdiction raised by Bulgaria: namely, that the impugned actions of the administrative, judicial and legislative authorities all fall within the exclusive jurisdiction of Bulgaria.

[271] With regard to this aspect of the allegation of lack of jurisdiction, the following observations are called for.

[272] The subject of the dispute is stated in the Application and consists in an alleged failure by Bulgaria to fulfil her international obligations. In the dispute the two Parties are in conflict as to their respective rights : the alleged failure to fulfil international obligations, on the one hand, and alleged exclusive jurisdiction, on the other. Accordingly, the dispute comes under Article 4 of the Treaty of 1931.

[273] Bulgaria recognizes the jurisdiction of the Court to declare that the impugned actions of the administrative, judicial and legislative authorities all fall exclusively within the domestic jurisdiction of Bulgaria. She even insists upon it when she asks the Court to declare that it has no jurisdiction to entertain the Belgian Application. A decision to the effect that the actions of the administrative, judicial and legislative authorities complained of all fall within the domestic jurisdiction of Bulgaria would require that the Court should undertake the same investigation as that asked for in the first place by the Belgian Application when it asks the Court to declare that the State of Bulgaria in consequence of these actions has failed in her international obligations. For, before it could adjudicate on the question whether Bulgaria has failed in all or some of her international obligations contemplated in the Belgian Application, the Court would have to decide if Bulgaria had any international obligations in relation to the acts complained of or whether, on the contrary, these acts fall solely within the domestic jurisdiction of Bulgaria. It follows that an examination of Bulgaria's fundamental preliminary objection to the jurisdiction would entail an examination of the merits and that, consequently, this objection does not possess the nature of a preliminary objection and must be rejected, though Bulgaria could take it up again as a plea in defence.

[274] The foregoing observations point to the rejection of the four preliminary objections, while at the present stage of the proceedings the Court is not called upon to adjudicate on paragraph 2 of the Bulgarian submissions.

(Signed) V. Eysinga. [p118]

Dissenting Opinion of Mr. Hudson.

[275] The Bulgarian Government has advanced a preliminary objection in this case, asking the Court to declare that it lacks jurisdiction to deal with the application filed by the Belgian Government on January 26th, 1938, and to dismiss the Belgian claims. This challenge to the Court's jurisdiction requires that attention be given, at the outset, to the possible sources of jurisdiction, and to the bases upon which Belgium asserts and Bulgaria contests jurisdiction to deal with this case. If two States parties to a case before the Court agree that the Court has jurisdiction, it will usually be unnecessary

for the Court to look further for confirmation of its jurisdiction; but where, as here, the jurisdiction is contested, the Court must look for a source of its jurisdiction in the applicable law in spite of the fact that the parties may trace their contentions to the same source or sources.

[276] In the diplomatic correspondence which preceded the filing of the Belgian Application, the Belgian-Bulgarian Treaty of conciliation, arbitration and judicial settlement of June 23rd, 1931, was put forward by the Belgian Minister at Sofia as the sole source of the jurisdiction to be invoked. In a letter addressed to the Bulgarian Minister for Foreign Affairs on June 24th, 1937, the Belgian Minister proposed the conclusion of a compromis for submitting the dispute to the Court, stating that it fell within the class of disputes which the provisions of Articles 4 to 6 of the Treaty of 1931 permitted to be taken to the Court by unilateral application unless agreement was reached for submitting them to arbitration; reference was made parenthetically only to the declaration by which in 1921 Bulgaria had recognized the obligatory jurisdiction of the Court, but no mention was made of the declaration by which Belgium had recognized the Court's obligatory jurisdiction and no indication was given of any desire on the part of the Belgian Government to avail itself of the reciprocal declarations of Belgium and Bulgaria. On July 30th, 1937, the Belgian Minister informed the Bulgarian Minister for Foreign Affairs that as the Belgian Government saw no possibility of an agreement between the two Governments for submitting the dispute to arbitration in accordance with the provisions of the Treaty of 1931, the dispute would be put before the Court by the [p119] unilateral application of the Belgian Government. In his reply of August 3rd, 1937, the Minister for Foreign Affairs referred to the Belgian Government's intention to go before the Court by unilateral application based on the Treaty of 1931, and he gave notice of the Bulgarian Government's intention to avail itself of the privilege accorded by Article 3 of that Treaty.

[277] These were the communications exchanged by the Parties prior to the filing of the Belgian Application. They gave no indication that any source of the Court's jurisdiction was to be relied upon other than the Treaty of 1931. References by the Parties to the sources of the Court's jurisdiction may now be traced through the documents of the written proceedings.

[278] The Belgian Application filed with the Registry of the Court on January 26th, 1938, referred to two sources of jurisdiction:

- (1) the declarations of adherence made by Belgium and Bulgaria to the Optional Clause accepting as compulsory the jurisdiction of the Court, which declarations were respectively ratified on March 10th, 1926, and August 12th, 1921;
- (2) the Treaty of conciliation, arbitration and judicial settlement concluded between the two countries on June 23rd, 1931.

[279] The Memorial presented by the Belgian Government contained (pp. 18-19) a section entitled "La compétence de la Cour", in which it was said that the Belgian Government found a justification of the Court's jurisdiction in the Treaty of 1931, and Articles 4 and 37 of the Treaty were set out in extenso; the Memorial proceeded to state that surabondamment the Belgian Government based the Court's jurisdiction on the "declarations of adherence of Belgium and of Bulgaria to the Optional

Clause", but the texts of these declarations were not set forth. In the additional Memorial subsequently submitted by the Belgian Government, it was said (p. 9) that the Treaty of 1931 had been indicated in the Memorial as a basis of jurisdiction en deuxième lieu; and reference was made (p. 15) au fondement de compétence de la Cour que surabondamment la Partie demanderesse croit trouver dans le Traité de 1931.

[280] On its side, the Bulgarian Government expressed the view (Bulgarian Memorial, p. 8) that the Belgian contentions as to the Court's jurisdiction were justified neither on the basis of the declarations cited nor on the basis of the Treaty of 1931.

[281] It was only in the oral proceedings that reference was made to the relation existing between the Treaty of 1931 and the earlier declarations, as possible sources of the Court's jurisdiction to deal with this case. Though the Belgian Agent had contended that chacun de ces deux actes suffit en réalité à lui seul pour étayer nos revendications, M. Rolin, Counsel for the Belgian Government, expressed the view (Exposés oraux, [p120] pp. 49-50) that it would be absurd to imagine that it had been intended by the Belgian and the Bulgarian Governments in 1931 to create an additional system to be in force cumulatively with the Optional Clause by which the two States were already bound; and that, during the period when it was in force, the Treaty of 1931 prevailed over the Optional Clause. Hence he concluded that the legal relations between Belgium and Bulgaria were governed as follows: until February 3rd, 1933, by the Optional Clause: from February 3rd, 1933 — date of the entry into force of the Treaty of 1931 [FN1] — to February 3rd, 1938, by the Treaty; and since February 3rd, 1938, by the Optional Clause. Later in the course of his expose, however, M. Rolin stated (p. 56) that reflection had led him to question the correctness of his earlier statement; with the result that, after reflection, he considered that in the period during which the Treaty was in force the Court could take the Optional Clause into consideration dans la mesure où elle n'est pas modifiée par les amendements qu'éventuellement y a apportés le Traité entre la Belgique et la Bulgarie.

 [FN1] The exchange of ratifications of the Treaty of 1931 took place not on February 3rd, but on February 4th, 1933.

[282] In reply to M. Rolin's statement, the Bulgarian Agent gave (pp. 74-75) various reasons for the Bulgarian view that the Treaty of 1931 did not suspend the functioning of the Optional Clause; he contended that, with respect to the obligation of judicial settlement, the Treaty of 1931 left intact the pre-existing legal situation, and that the dispositions in the Treaty concerning judicial settlement served only the purpose of a reference to the pre-existing situation, without effecting any modification in that situation.

[283] On this presentation of the problem as to the source or sources of the Court's jurisdiction, it is necessary to consider in some detail the legal obligations of Belgium and Bulgaria inter se with reference to the jurisdiction of the Court, as they existed on January 26th, 1938, the date when the Belgian Application was filed.

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[284] On August 12th, 1921, the Bulgarian Government deposited at Geneva a ratification of a declaration made on July 29th, 1921, in connection with Bulgaria's signature of the Optional Clause, the text of which was as follows: [p121]

"On behalf of the Government of the Kingdom of Bulgaria I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory ipso facto and without any special convention, unconditionally. "

[285] On September 25th, 1925, the Optional Clause was signed on behalf of Belgium, with the following declaration:

"On behalf of the Belgian Government, I recognize as compulsory, ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court for a period of fifteen years, in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement. "

[286] A ratification of the Belgian declaration was deposited at Geneva on March 10th, 1926. After this date, therefore, Belgium and Bulgaria were bound inter se to recognize the Court's jurisdiction with respect to the disputes enumerated in Article 36, paragraph 2, of the Statute, with the two exceptions established by the Belgian declaration, i. e., excepting (1) disputes arising before March 10th, 1926, and (2) disputes with regard to situations or facts prior to March 10th, 1926. The obligation of the two States was not applicable, however, in cases where the Parties had agreed or might agree to have recourse to another method of pacific settlement.

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[287] On June 23rd, 1931, representatives of Belgium and Bulgaria signed a Treaty of conciliation, arbitration and judicial settlement, so entitled; ratifications of this Treaty were exchanged on February 4th, 1933 [FN1]. On that date, in accordance with the provisions in Article 37 (2), the Treaty entered into force for a period of five years, expiring on February 4th, 1938. On August 3rd, 1938, six months before the expiration of the five-year period and in accordance with the provisions in Article 37 (3), the Treaty was "denounced" by Bulgaria; hence it did not continue in force for an additional period of five years after February 4th, 1938.

 [FN1] The Treaty was registered with the Secretariat of the League of Nations, No. 3156, on March 3rd, 1933. 137 League of Nations Treaty Series, p. 191.

[288] The Treaty provides (Art. 1) that disputes of every kind which may arise between the Parties and which it may not have been possible to settle by diplomacy shall be submitted [p122] to judicial settlement or arbitration, preceded either obligatorily or optionally by a procedure of conciliation. Disputes "with regard to which the Parties are in conflict as to their respective rights" — it is expressly stated that these disputes include those mentioned in Article 36 of the Court's Statute — are to be submitted to the Court (Art. 4) unless the Parties agree upon resort to an arbitral tribunal. Provision is made for the procedure of arbitration of such disputes if the Parties agree on arbitration, and also for a procedure of conciliation of such disputes if the Parties agree on conciliation. As to disputes other than those "with regard to which the Parties are in conflict as to their respective rights", a procedure of conciliation is made obligatory (Art. 8), elaborate provision being made for the conduct of this procedure; and if the conciliation does not lead to an agreement between the Parties, arbitration then becomes obligatory for these disputes (Art. 24), provision being made for constituting the arbitral tribunal and for the procedure to be followed.

[289] Comparing the Treaty of 1931, in so far as it relates to judicial settlement, with the reciprocal declarations made by Belgium and Bulgaria under Article 36, paragraph 2, of the Statute, it will be seen that the Treaty provision for judicial settlement by the Court applies to all the legal disputes which would be covered by the declarations, and it may go further in that it applies to all disputes with regard to which the Parties are in conflict as to their respective rights. The Treaty is also more extensive in that it does not exclude disputes with regard to situations or facts anterior to March 10th, 1926. On the other hand, the Treaty contains two conditions not set by the reciprocal declarations; under Article 1 of the Treaty, the dispute must be one "which it may not have been possible to settle by diplomacy"; and under Article 3 of the Treaty, if the dispute is one of which the subject (Fr. objet) according to the law of one of the Parties falls within the competence of its judicial or administrative authorities, that Party may object to the dispute's being submitted for settlement by a method laid down in the Treaty until a definitive decision has been pronounced within a reasonable time by the competent authority. One other difference is to be noted while the Bulgarian declaration of 1921 was not limited to any period of time, the Belgian declaration was limited to a period of fifteen years expiring on March 10th, 1941; the Treaty on the other hand was concluded for successive five-year periods, and as events turned out it ceased to be in force at the end of the first period of five years, i. e., on February 4th, 1938. [p123]

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[290] This being the situation, the Court must say what law obtained between Bulgaria and Belgium on January 26th, 1938, the date of the filing of the Belgian Application. The fact that the Treaty of 1931 ceased to be in force some nine days later can have no bearing on the Court's jurisdiction with respect to this case. If the jurisdiction existed on January 26th, 1938, it will continue until the case is disposed of in due course; this is expressly recognized, indeed, in Article 37 (4) of the Treaty.

[291] On January 26th, 1938, then, were the provisions of the Treaty of 1931 operative? Were the reciprocal declarations made by Belgium and Bulgaria under Article 36, paragraph 2, of the Statute, also operative? And if the latter question be answered in the affirmative, do the reciprocal declarations and the Treaty constitute independent ways of access to the Court? Or are their

provisions in some way cumulative, so as to require that the conditions of both must be met before the Court's jurisdiction can be invoked ? These questions will have to be considered, however, only if both the reciprocal declarations and the Treaty of 1931 are found to be applicable, in their terms, to this case.

[292] The jurisdiction conferred on the Court by the Belgian declaration is in terms not applicable "in cases where the Parties have agreed or shall agree to have recourse to another method [Fr. mode] of pacific settlement". The first question is whether this is such a case, whether the Treaty of 1931 constitutes, for cases falling under Article 36, paragraph 2, of the Statute, "another method of pacific settlement" upon which the Parties have agreed.

[293] Article 4 of the Treaty of 1931 requires recourse to the Court "unless the Parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal"; and Article 5 provides for giving effect to such an agreement for arbitration. Under Article 7 of the Treaty, before any resort to the Court or to an arbitral tribunal, "the Parties may agree to have recourse to the conciliation procedure provided for in the present Treaty". Hence it would seem that for the legal disputes which are covered by Article 36, paragraph 2, of the Statute and to which the reciprocal declarations of Belgium and Bulgaria apply, the Treaty provides not a system of judicial settlement alone, but a system of conciliation, arbitration and judicial settlement, all three of which are in a sense bound together. Disputes for which the declarations provide a settlement by the Court may under the Treaty be referred to the Court, [p124] or to arbitration, or to conciliation followed (if necessary) by the Court's adjudication, or to conciliation followed (if necessary) by arbitration. The system of the Treaty is then different from the system of the declarations, though the judicial settlement (as distinguished from arbitration) is in both systems confided to the Court. It may be said, however, that under the Treaty an agreement between the Parties is necessary before conciliation or arbitration can be substituted for or placed before judicial settlement, and that even under the declarations it was open to the Parties to agree upon the conciliation or the arbitration of a dispute as an alternative to judicial settlement. Yet the system of the Treaty is in this respect different from that of the reciprocal declarations, because the Treaty provides in terms for the alternative and lays down the lines which the alternative is to follow.

[294] The two systems being different, it would seem that this is a case in which the Parties have agreed, in the terms of the Belgian declaration, "to have recourse to another method of pacific settlement". If this conclusion be sound, the reciprocal declarations by Belgium and Bulgaria are not to be applied as a source of jurisdiction in this case, and the Court's jurisdiction may be sought only in the Treaty of 1931.

[295] Note may here be made of Article 2 of the Treaty of 1931 which provides that "disputes for the settlement of which a special procedure is laid down in other conventions in force" between the Parties "shall be settled in conformity with the provisions of such conventions". It is not a simple matter to give a precise meaning to this provision [FN1]; but it would seem quite clear that the Belgian and Bulgarian declarations are not in this sense a convention laying down "a special procedure" for the settlement of the legal disputes covered by Article 36, paragraph 2, of the Statute.

[FN1] See the strictures on this provision by "Gallus" (a pseudonym), in 57 *Revue de Droit international et de Législation comparée* (1930), p. 879.

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[296] If it should be thought that the Treaty of 1931 does not provide for "another method of pacific settlement" within the meaning of the concluding phrase of the Belgian declaration, the Court would then have before it two texts — the reciprocal declarations of Belgium and Bulgaria on the one hand, and the Treaty of 1931 on the other hand — dealing with the same [p125] general subject-matter. In such a situation the relation between the two texts cannot be disregarded.

[297] Each of the texts is a statement of the Parties' intention to confer jurisdiction on the Court, but the jurisdiction is not the same in each case. In consequence of the reserve in the Belgian declaration, the reciprocal declarations had the effect of confining the Court's obligatory jurisdiction to disputes with regard to situations or facts posterior to March 10th, 1926; the text of the Treaty, on the other hand, is quite opposed to this limitation. Article 4 of the Treaty gives the Court jurisdiction over "all disputes with regard to which the Parties are in conflict as to their respective rights"; these are expressly said to include the disputes "mentioned in Article 36 of the -Statute", to some of which the reciprocal declarations apply, and the Treaty does not exclude disputes with regard to situations or facts anterior to any particular date. Clearly, therefore, the Treaty's provision for the Court's jurisdiction is inconsistent with that of the reciprocal declarations, and in this case the two sources cannot be drawn upon simultaneously.

[298] Called upon to choose which of the two texts is to govern in this case, the Court must apply a general principle of law, and it must say that the expression of the Parties' intention which is the later in point of time should prevail over that which is the earlier. The Parties had it in their power to enlarge their legal obligations resulting from the declarations, and this they did by the Treaty of 1931 which confers on the Court a more extensive jurisdiction than that conferred by the declarations. Moreover, the Treaty is an instrument which was drawn up to apply specially to the relations of Belgium and Bulgaria; the declarations were not drawn up with reference to the relations of Belgium and Bulgaria alone, each declaration being made by one of these States with reference to its relations with all other States recognizing the Court's jurisdiction as provided for in Article 36, paragraph 2, of the Statute. Whereas the declarations were of possible and actual interest to many States, the Treaty, though it followed a standard model, concerned only the two signatory States. If it is to be said that the special prevails over the general instrument, or that the more extensive prevails over the less extensive provision, the result here will coincide with the application of the rule that a later will prevail over an earlier text [FN1]. [p126]

[FN1] On this point, see the discussion by "Gallus" in 8 *Revue de Droit international* (1931), pp. 392-395

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[299] If confirmation is desired of the Parties' intentions that the Treaty should confer on the Court a jurisdiction more extensive than that conferred by the reciprocal declarations and not limited to disputes with regard to situations or facts posterior to March 10th, 1926, it can be found in what may be referred to as the pre-natal history of the Treaty of 1931. Though a reference to this history was made by the Bulgarian Agent, neither of the Parties endeavoured to place the whole record before the Court. The preamble to the Treaty of 1931 recalls a recommendation made by the Assembly of the League of Nations in a resolution of September 26th, 1928; this in itself is a basis for summoning the aid of the Treaty's history.

[300] In 1927, the Eighth Assembly of the League of Nations, "anxious to bring about the political conditions calculated to assure the success of the work of disarmament", recommended "the progressive extension of arbitration by means of special or collective agreements". To this end, it asked the Council to instruct the Preparatory Disarmament Commission to create a committee to consider measures which might be taken "with a view to promoting, generalizing, and coordinating special or collective agreements on arbitration and security" [FN1]. As a result of this resolution, a Committee on Arbitration and Security was created, to which the Swedish Government suggested the idea of a collective agreement based on the Locarno treaties; this Committee prepared various drafts of conventions on pacific settlement, all of which were faithful to the Locarno formulæ in that they contained provisions for excluding from the Court's jurisdiction disputes concerning anterior facts [FN2]. The work of the Committee on Arbitration and Security led to the adoption by the Ninth Assembly of the resolution of September 26th, 1928 [FN3], to which reference is made in the preamble of the Belgian-Bulgarian Treaty of June 23rd, 1931. This resolution invited States to accept obligations concerning pacific settlement "either by becoming parties to the annexed General Act, or by concluding particular conventions with individual States in accordance with the model bilateral conventions annexed hereto". To the resolution were annexed a draft General Act and drafts of three model bilateral conventions, "Convention a", "Convention b", and "Convention c". The annexed General Act contained in Article 39 provision for possible reservations which would "exclude from the procedure" provided for, "disputes arising out [p127] of facts prior" to accession to the Act. The annexed model bilateral "Convention a" contained, between Article 34 and Article 35, the word "Article1"; no number was assigned to this "article" and no text was given, but the footnote to which the figure "1" referred suggested that "States desiring to introduce reservations might insert here an article based on Article 39 of the General Act.... "2. Similar provisions were included in models "b" and "c". Thus, the text of the draft General Act provided expressly for possible reservations excluding disputes arising out of anterior facts, and the texts of the model bilateral conventions carried an unnumbered blank article referring to a footnote which called attention to the possibility of the same reservation.

[FN1] Records of Eighth Assembly, Plenary, pp. 177-178

[FN2] League of Nations Document, C. 358. M. 112. 1928. IX

[FN3] Records of Ninth Assembly, Plenary, p. 182.

[FN1] League of Nations Document, C. 358. M. 112. 1928. IX

[FN2] This note is to be found with the text of "Convention a" as published in League of Nations Document C. 536. M. 163. 1928. IX; in Records of Ninth Assembly, Plenary, p. 502; and in League of Nations Official Journal. Special Supplement No. 63, p. 31.

"Convention a", as annexed to the Assembly resolution of September 26th, 1928, served as the model of the Belgian-Bulgarian Treaty of June 23rd, 1931; in general the text of the Treaty follows almost verbatim that of the draft. Two significant departures are to be noted, however:

(1) The suggestion in the unnumbered, blank article placed between Article 34 and Article 35 of the draft was completely rejected when the Treaty was drafted. For the text of the Treaty contains no reference to the exclusion of disputes with regard to anterior facts, and neither in signing nor in ratifying the Treaty did the Parties make any such reservation. This would seem to be a clear indication of the Parties' intention that disputes with regard to anterior facts should not be excluded from the jurisdiction conferred on the Court by the Treaty of 1931.

[301] (2) Article 2 of "Convention a", following Article 29 of the General Act, contains these provisions:

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

2. The present Convention shall not affect any agreements in force by which conciliation procedure is established between the High Contracting Parties or they are bound by obligations to resort to arbitration or judicial settlement which ensure the settlement of the dispute. If, however, these agreements provide only for a procedure of conciliation, after such procedure has been followed without result, the provisions of the present Convention concerning judicial settlement or arbitration shall be applied. "[p128]

[302] The text of Article 2 of the Treaty of 1931 is quite different, running as follows:

"Disputes for the settlement of which a special procedure is laid down in other conventions in force between the High Contracting Parties shall be settled in conformity with the provisions of such conventions. Nevertheless, should the settlement of the dispute not be achieved by application of this procedure, the provisions of the present Treaty concerning arbitration or judicial settlement shall be applied. "

[303] The Treaty of 1931 thus fails to include the provision in paragraph 2 of Article 2 of the model adopted by the Assembly, which was designed to continue the operation of prior obligations, such as those of reciprocal declarations under Article 36, paragraph 2, of the Statute. This is another indication of the Parties' intention that Article 4 of the Treaty of 1931 was to free them of the limitations established by the reciprocal declarations, so long as the Treaty should remain in force.

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[304] Further indication of the Parties' intentions as to the scope of the Treaty of 1931 may be sought in the general policy followed by each of the two signatory States in entering into treaties with other States.

[305] Bulgaria's general policy is quite consistently that indicated in the Bulgarian declaration of 1921. Though Bulgaria did not accede to the General Act of 1928, it entered into a number of treaties which follow the model drafts adopted by the Assembly in 1928: with Turkey, March 6th, 1929 [FN1]; with Hungary, July 22nd, 1929 [FN2] ; with Poland, December 31st, 1929[FN3] ; with Spain, June 26th, 1931 [FN4] with Norway, November 26th, 1931[FN5] ; with Denmark, December 7th, 1935 [FN6] ; and with Latvia, May 23rd, 1933. Of these treaties only that with Poland excluded disputes with regard to anterior situations or facts [FN7].

 [FN1] 114 League of Nations Treaty Series, p. 399.

[FN2] 101 *idem*, p. 41.

[FN3] 113 *idem*, p. 89.

[FN4] 166 *idem*, p. 341.

[FN5] 134 *idem*, p. 27.

[FN6] 182 *idem*, p. 183.

[FN7] Bulgaria's treaties with the United States of America, of January 21st, 1929 (93 *idem*, pp. 331, 337), and its treaty with Mexico, of November 5th, 1936 (187 *idem*, p. 37), follow special forms.

[306] Belgium seems for a time to have assigned great importance to the exclusion of disputes with regard to anterior situations or facts. Soon after the signature of its declaration of September 25th, 1925, Belgium entered into a treaty with [p129] Germany, initialled at Locarno on October 16th, 1925 [FN1], which (Art. 1) did not apply to "disputes arising out of events prior to the present Convention and belonging to the past". Then followed treaties with Sweden, April 30th, 1926 [FN2]; with Switzerland, February 5th, 1927 [FN3]; with Denmark, March 3rd, 1927 [FN4]; with Finland, March 4th, 1927 [FN5]; with Portugal, July 9th, 1927 [FN6]; and with Poland, October 25th, 1928 [FN7] - all of which expressly excluded either disputes with regard to anterior situations or facts, or disputes arising out of prior events. A treaty with Spain, July 19th, 1927 , did not contain the exclusion, but the final protocol gave a reason for this, viz., that no dispute was then pending between the two States. A treaty with Luxemburg, October 17th, 1927 , on the other hand, provided (Art. 1) for its application to the disputes for the solution of which a method of pacific settlement had been provided by the Economic Convention between the two countries, even when such disputes referred to facts prior to the conclusion of the treaty.

[FN1] 54 League of Nations Treaty Series, p. 303.

[FN2] 67 *idem*, p. 91.

[FN3] 68 *idem*, p. 45.

[FN4] 67 *idem*, p. 117.

[FN5] 69 *idem*, p. 361.

[FN6] 74 *idem*, p. 39.

[FN7] Publications of the Court, Series D, No. 6, p. 308.

[FN8] 80 League of Nations Treaty Series, p. 17.

[FN9] 124 *idem*, p. 203.

[307] Following the Assembly's adoption of its resolution of September 26th, 1928, Belgium acceded to the General Act on May 18th, 1929, with a reservation as to disputes arising out of anterior facts [FN10]; but thereafter some change is noticeable in Belgian policy. Belgium's treaties with Czechoslovakia, April 23rd, 1929 [FN11] ; with Greece, June 25th, 1929 [FN12] ; with Lithuania, September 24th, 1930 [FN13] ; and with Bulgaria, June 23rd, 1931, followed the Assembly's model "Convention a", and none of them referred to the exclusion of disputes with regard to anterior situations or facts. A treaty with Yugoslavia, March 25th, 1930 [FN14] , did not apply to "disputes which arose prior to the conclusion of the present Convention" ("différends nés antérieurement à la conclusion de la présente Convention"); while treaties with Roumania, July 8th, 1930 [FN15] , with Turkey, April 18th, 1931 [FN16] , and with Venezuela, August 14th, 1935 [FN17], did not apply [p130] to disputes arising out of anterior facts and belonging to the past [FN1].

[FN10] 93 *idem*, p. 344.

[FN11] 110 *idem*, p. 113.

[FN12] 113 *idem*, p. 117.

[FN13] 129 *idem*, p. 399.

[FN14] 106 *idem*, p. 343.

[FN15] 128 *idem*, p. 403.

[FN16] Publications of the Court, Series D, No. 6, p. 475.

[FN17] Documents parlementaires (Belgique), 1935-1936, No. 75.

[FN1] Belgium's treaties with the United States of America of March 20th, 1929 (109 League of Nations Treaty Series, pp. 261, 267), and its treaty with Persia of May 26th, 1929 (no *idem*, p. 369), follow special forms.

[308] Of course the inclusions and exclusions in a treaty may be due to insistence by either of the parties to the treaty. Yet this record seems to point to the conclusion that the omission of the exclusion from the Belgian-Bulgarian Treaty of 1931 was effected entirely by design, and that it was

due to an intention that the provisions of the Treaty should apply to all disputes whether they concerned anterior or posterior situations or facts. While some of the States with which Belgium entered into these treaties were previously bound by declarations under Article 36, paragraph 2, of the Court's Statute, others were not; so that the difference in the texts of the treaties cannot be explained by the previous position of these States with reference to such declarations.

[309] A further point may be mentioned as to the character of the Treaty of 1931. On September 26th, 1928, the Council of the League of Nations instructed the Secretariat to prepare "an introductory note explaining the structure of the treaties", drafts of which had on that date been adopted by the Assembly, and the note was to be communicated to Governments along with the texts [FN2]. On October 15th, 1928, the Secretariat issued a document containing the texts of the General Act and the model bilateral conventions, with an "Introductory Note to the General Act and the model bilateral Conventions a, b, c, for the Pacific Settlement of International Disputes" [FN3]. In this Introductory Note it is said (p. 8) that "the General Act and the three bilateral conventions are in substance the same"; and (on p. 9) it is said that "the conventions had been drafted in such a manner that they in no way affect other conventions of any kind which States may have concluded or may conclude for the pacific settlement of disputes. The new conventions will only be applied subsidiarily and will only settle disputes which do not come within the scope of other conventions. " The importance of this statement is not to be minimized; it is confirmed in the studies of the General Act by the well-informed "Gallus", published in the *Revue de Droit international et de Législation compare* [FN4] and in the *Revue de Droit international* [FN5]. "Gallus" stresses the subsidiary character of the General Act, derived from paragraph 2 of Article 29; [p131] and it has been noted above that the model "Convention a" contained a counterpart of that paragraph in its Article 2. The statement quoted from the Introductory Note is applicable to the General Act because of the provision in Article 29, paragraph 2, and to the model bilateral "Convention a" because of the provision in Article 2, paragraph 2. It does not apply to the Treaty of 1931, however, for that Treaty contains no provision corresponding to Article 29, paragraph 2, of the General Act, or to Article 2, paragraph 2, of "Convention a".

[FN2] League of Nations Official Journal, 1928, p. 1670.

[FN3] Document C. 536. M. 163. 1928. IX.

[FN4] Volume 57 (1930), pp. 190-246, 413-472, 878-925.

[FN5] Volume 8 (1931), pp. 377-424.

[310] If it had been the intention of the Belgian and Bulgarian Governments that their obligations under the reciprocal declarations should continue unmodified during the period when the Treaty of 1931 was in force, this result could have been accomplished by a simple expedient. The two States might have acted on the Assembly's suggestion in the blank, unnumbered article in Convention "a" and made a reservation as to disputes with regard to anterior facts; or they might have retained in the Treaty a provision corresponding to Article 2, paragraph 2, of "Convention a"; or they might have stated expressly that the Treaty did not in any way modify the effect of the prior declarations. It is not

without interest in this connection that this last suggested course was taken by certain other States in concluding similar treaties [FN1], and even by Belgium in concluding the Treaty with Persia of May 23rd, 1929 [FN2].

[FN1] See the final protocol to the Austrian-Swiss Treaty of October 11th, 1924, 33 League of Nations Treaty Series, p. 432; the additional protocol to the Convention of January 17th, 1925, between Estonia, Finland, Latvia and Poland, 38 idem, p. 368; and the protocol of signature to the Norwegian-Polish Treaty of December 9th, 1929, 101 idem, p. 340.

[FN2] 110 idem, p. 369.

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[311] To summarize what has been said, first of all the reciprocal declarations are not applicable in this case because it is a case for which, to employ the concluding phrase of the Belgian declaration, the Parties have agreed "to have recourse to another method of pacific settlement", the method of the Treaty of 1931. Even if this view be rejected, however, as the text of the Treaty is inconsistent with the texts of the reciprocal declarations and as it is later in point of time, the Treaty must prevail over the declarations during the period when the Treaty is in force. The history of the Treaty shows that the Parties intended for a period to free themselves of the reserve in the Belgian declaration, and to include in the [p132] jurisdiction conferred on the Court disputes with regard to anterior situations or facts. This is borne out, also, by the policy followed both by Bulgaria and by Belgium in concluding treaties with other States. Two essential differences existing between the Treaty of 1931 and "Convention a" of 1928 make it impossible to attribute to the former the subsidiary character which may be attributed to the latter

[312] The conclusion to be drawn is that on January 26th, 1938, while the Treaty of 1931 was in force, the relations between Belgium and Bulgaria with respect to the jurisdiction of the Court were governed by the Treaty of 1931 and not by the reciprocal declarations made under Article 36, paragraph 2, of the Statute. Hence, the Treaty of 1931 is the sole possible source of the Court's jurisdiction to deal with this case.

[313] The conclusion that the Court's jurisdiction to deal with this case must be derived, if at all, from the Treaty of 1931 makes it unnecessary to enquire whether the condition set by the Belgian declaration, that the dispute must be with regard to situations or facts posterior to March 10th, 1926, has been fulfilled in this case. The conclusion makes it necessary, however, to enquire as to the fulfilment in this case of the two conditions set by the Treaty of 1931, (1) the requirement of Article 1 that the dispute must be one "which it may not have been possible to settle by diplomacy", and (2) the requirement that on the hypotheses set out in Article 3 a definitive decision must have been pronounced by a competent local authority. Both of these questions have been raised in connection

with the Bulgarian preliminary exception.

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[314] The provision in Article 1 of the Treaty, that the dispute must be one which it may not have been possible to settle by diplomacy, is not a meaningless formality. In the past the Court has drawn attention to the importance of prior negotiations [FN1], and where the requirement is expressly laid down in a treaty it cannot be disregarded. What is essential is that prior to the filing of an application by one party bringing the dispute before the Court, the other party must have been given the opportunity to formulate and to express its views on the subject of the dispute. Only diplomatic negotiations will have afforded such an opportunity. The precise point at which it may properly be said that the negotiations instituted cannot [p133] result in a settlement of the dispute may have to depend, as the Court has also recognized [FN1] upon "the views of the States concerned".

[FN1] In the Mavrommatis case, Series A, No. 2, p. 15.

[FN1] Series A, No. 2, p. 15.

[315] The submissions of the Belgian Government, as stated in its Application and in its Memorial, relate to the alleged failure of Bulgaria in its international obligations (1) by reason of the tariff put into force in 1934 by the State Administration of Mines, to enable the Municipality of Sofia to distort the application of the decisions given by the Mixed Arbitral Tribunal in 1923 and 1925 [FN2]; (2) by reason of the judgments of Bulgarian courts which deprived the Electricity Company of Sofia and Bulgaria of the benefit of the decisions of the Mixed Arbitral Tribunal; and (3) by reason of the promulgation of the law of February 3rd, 1936, establishing a tax on the distribution of electric power purchased from concerns not subject to tax. In so far as Belgium's claims are based on grounds (1) and (2), they were the subject of diplomatic negotiations prior to the filing of the Belgian Application on January 26th, 1938. It may therefore be said that the dispute with respect to these claims was one which, in the language of Article 1 of the Treaty of 1931, it was not "possible to settle by diplomacy".

[FN2] These decisions are reported in 3 Recueil des LLLDecisions des Tribunaux arbitraux mixies, p 308 and 5 idem, pp 758, 770

[316] With respect to the claim based on ground (3), i. e. on the promulgation of the Bulgarian law of February 3rd, 1936, the situation is different. This law was not referred to in the previous diplomatic correspondence put before the Court; indeed, in the Additional Memorial of the Belgian Government (p. 16), it was said that the Belgian Government had judged it useless to engage in

special negotiations relating to this part of its claim. Though this statement was somewhat modified by the Belgian Agent in the course of the oral proceedings, no proof was furnished of any diplomatic negotiations relating to the law of 1936 which may have taken place prior to the filing of the Belgian Application. It seems clear, therefore, that the condition set by Article 1 of the Treaty was not met with regard to the Belgian claims based upon the promulgation of the Bulgarian law of February 3rd, 1936. Hence the Court lacks jurisdiction to deal with this part of the Belgian claim.

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[317] It remains to enquire whether the condition set by Article 3 of the Treaty has been met with reference to that part of the Belgian claims which relates to (1) the tariff put into force in 1934 by the State Administration of Mines, and (2) [p134] the judgments of the Bulgarian courts, i. e. the action taken by administrative and judicial authorities in Bulgaria in connection with the application of the price formula fixed by the Mixed Arbitral Tribunal in 1925.

[318] The first paragraph of Article 3 of the Treaty reads as follows:

"In the case of a dispute the occasion (Fr. *Objet*) of which, according to the municipal law of one of the High Contracting 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 Treaty until a decision with final effect has been pronounced within a reasonable time by the competent authority. "

[319] The provision has some resemblance to, but should not be confused with, the common-law rule concerning the exhaustion of local remedies, which was recently applied by the Court in the case of the Panevezys-Saldutiskis Railway [FN1]. Provisions of similar import are to be found in a large number of recent treaties.

[FN1] Series A/B, No. 76.

[320] It was not seriously contested in this case that under Bulgarian law the application of the price formula fixed by the Mixed Arbitral Tribunal in 1925 is a subject (Fr. *objet*) which, in the first instance at any rate, falls within the competence of the Bulgarian authorities. The exclusive competence of the Bulgarian courts over disputes on this subject was asserted by the Bulgarian Minister for Foreign Affairs in his letter of August 3rd, 1937, addressed to the Belgian Minister; but it was also stated in that letter that, *par application de l'article 3 du même traité* (i. e., the Treaty of 1931), *le Gouvernement bulgare revendique, en l'occurrence, la compétence de ses propres tribunaux, et il ne saurait consentir à ce que le différend soit soumis aux diverses procédures prévues par ledit traité.* It would seem to be possible to conclude that for the purpose of applying Article 3 of the Treaty of 1931 the necessary hypotheses exist in this case. The dispute here is one the subject (Fr. *objet*) of which, according to Bulgarian law, falls within the competence of the judicial or

administrative authorities of Bulgaria; and by the letter of August 3rd, 1937, Bulgaria did object to this dispute's being submitted for settlement by a method laid down in the Treaty. That objection is a bar to an exercise of the jurisdiction conferred on the Court "until a decision with final effect has been pronounced within a reasonable time by the competent authority".

[321] In 1936, the Municipality of Sofia instituted an action in the Regional Tribunal of Sofia against the Compagnie d'Électricité [p135] de Sofia et de Bulgarie, seeking a determination of its rights and obligations with reference to the sale-price of electricity at Sofia. The Compagnie defended this action, contending inter alia that the Tribunal lacked jurisdiction. Judgments were rendered in this action by the Regional Tribunal of Sofia on April 30th, 1936, May 26th, 1936, and October 24th, 1936. The Compagnie, and later the Municipality, appealed to the Court of Appeal, which gave its judgment on March 27th, 1937. An appeal (pourvoi) taken to the Cour de cassation by the Compagnie on June 23rd, 1937, was rejected on March 16th, 1938. It is not contended that the interval between June 23rd, 1937, and March 16th, 1938, was more than a reasonable period within the requirement of Article 3 of the Treaty of 1931. This being the case, the facts seem to show quite clearly that when the Belgian Application was filed on January 26th, 1938, the décision définitive required by Article 3 had not yet been pronounced by the competent authority.

[322] The conclusion follows that Article 3 of the Treaty of 1931 prevents the Court from exercising the jurisdiction referred to in Article 4 of that Treaty, with respect to the Belgian claim based upon the action taken by the State Administration of Mines in 1934 and the judgments of the Bulgarian courts in connection with the application of the price formula fixed by the Mixed Arbitral Tribunal in 1925.

[323] I am therefore of the opinion that the Court's jurisdiction in this case must be derived, if at all, from the Belgian Bulgarian Treaty of June 23rd, 1931; that under Article 1 of that Treaty the Court has no jurisdiction to deal with the Belgian claim relating to the promulgation of the Bulgarian law of February 3rd, 1936; and that under Article 3 of that Treaty the Court is precluded from exercising the jurisdiction which would have been conferred by Article 4 of the Treaty with respect to the Belgian claim based upon the action taken in 1934 by the State Administration of Mines and upon the judgments of the Bulgarian courts in connection with the application of the price formula fixed by the Mixed Arbitral Tribunal in 1925.

[324] On this view it is unnecessary to consider other questions which have been discussed before the Court.

[325] For these reasons, I think the preliminary objection advanced by the Bulgarian Government ought to be upheld.

(Signed) Manley O. Hudson. [p136]

Separate Opinion by M. De Visscher.

[Translation]

[326] Although concurring in the operative part of the judgment, I regret I am unable to accept some of its grounds, particularly in regard to two questions which are of considerable importance whether from a general point of view or from the point of view of the present case.

[327] 1.— The first point with which I disagree concerns the relations between the two diplomatic instruments upon which the Parties have relied. The judgment regards the Belgo-Bulgarian declarations accepting the Court's compulsory jurisdiction and the Treaty of June 23rd, 1931, as two separate and independent sources of jurisdiction. In my opinion they are two coordinated instruments; their respective provisions settle different questions ; they are on that account fully consistent one with the other and should be applied not as alternatives, but concurrently.

[328] Although, like the judgment and in conformity with the views of both Parties, I admit that the declarations accepting the compulsory jurisdiction of the Court remained in force during the current period of the 1931 Treaty, I do so because I believe that, when they signed that Treaty, the two States did not intend to establish a new source of jurisdiction. Bound in their mutual relations, as from March 10th, 1926, by an obligation to accept the Court's jurisdiction — an obligation with a longer term of application than that of the Treaty — why should they have suspended it for the pre-arranged term of five years assigned to the application of the Treaty and have substituted during that period a new source of jurisdiction for the pre-existing source, reverting by law to the latter on the expiry of the Treaty ? The argument based upon the Treaty's later date would be decisive in favour of the creation of a new source of jurisdiction only if it were clearly proved that the subject-matter of the undertaking resulting from its Article 4 was really wider in scope than that of the undertaking arising out of the declarations accepting the compulsory jurisdiction of the Court. But, although it is true that Article 4 — like the corresponding clause in the General Act of Geneva (Art. 17), which it reproduces — substituted for the definition of justiciable disputes contained in Article 36 of the Court's Statute the definition of those given in the arbitration conventions annexed to the Locarno Agreements (Oct. 16th, 1925), it cannot be said with certainty that the latter definition is [p137] really any wider than that contained in the above-mentioned Article of the Statute. The definition in Article 36 is drafted in terms of objective law; that of the Locarno arbitration conventions in terms of subjective law. That difference does not allow us to assume any appreciable extension to the field of justiciable disputes. As for the clause in paragraph 2 of Article 4 (Art. 17 of the General Act, second sentence) : "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 work preparatory to the General Act makes it clear that this clause was only included in the Act because the Locarno definition had been thought by some to be in fact more restrictive in certain respects than the definition in the Court's Statute.

[329] The two other provisions of the 1931 Treaty upon which the Bulgarian Government bases its objection: Article 1, which prescribes diplomatic negotiations, and Article 3 concerning previous exhaustion of internal remedies, are in my opinion of quite another character. They do not strictly concern the jurisdiction of the Court. These provisions appear in Chapter 1 of the Treaty, entitled : "Pacific Settlement in general". They lay down two conditions which the Treaty regards as preliminary to any international procedure falling within the methods in question, namely, conciliation,

arbitration and judicial settlement. The reference is no longer to the Court's jurisdiction, but to conditions upon which the Parties have agreed to allow recourse to that jurisdiction to depend.

[330] The two conditions are applicable to the Belgian Government's Application; but, since the general spirit of the Treaty of June 23rd, 1931, is obviously in favour of extending methods of peaceful settlement in general, it is impossible to imagine that, when the contracting Parties embodied in treaty form the rules upon which these conditions were to rest, they intended to make them more binding in their effects than they are under ordinary international law. This remark applies especially to the local redress rule, which is formulated in Article 3 of the Treaty in the same terms as in Article 31 of the General Act of Geneva. The preparatory work of the Ninth Assembly (1928) of the League of Nations shows that the authors of the General Act intended, in this matter as in others, merely to unify the terms of the many previous arbitration conventions, which themselves had only given expression to a rule long sanctioned by international usage. This rule is in fact inscribed in Article 3 of the Treaty of June 23rd, 1931, in terms almost identical with those of Article 3 of the Treaty of arbitration and conciliation between Germany and Switzerland, dated December 3rd, 1921, the prototype of these conventions. [p138]

[331] Finally, the conclusion to be drawn from a study of the various agreements mentioned above is that, in accordance, moreover, with the views of its most authoritative commentators, the General Act, in those of its provisions which apply to judicial settlement and which are reproduced in the 1931 Treaty, made little change in the system established by Article 36 of the Statute of the Court.

[332] Understood in this sense, the combined application of the declarations accepting the Court's compulsory jurisdiction and of the 1931 Treaty cannot involve any contradiction, the jurisdiction of the Court continuing to be based upon the declarations, and the two conditions governing admissibility contained in Articles 1 and 3 of the Treaty being therein fixed in accordance with ordinary international law.

[333] 2. — The judgment appears to me to have interpreted Article 3 of the 1931 Treaty relating to the need of exhausting local remedies with a strictness which seems to be in keeping neither with ordinary international law, of which in my view this Article is the mere expression, nor with the general spirit of the Treaty. My observations shall be brief.

[334] It is admitted that the rule requiring previous exhaustion of internal remedies shall be applied, not automatically, but having regard to the circumstances of the case and, more particularly, to any limitations which those circumstances may impose upon the effective nature of the remedy. The very text of the judgment delivered on March 16th, 1938, by the Bulgarian Court of Cassation shows that, in the view of that supreme tribunal, a number of apparently substantial grievances of the Belgian Company constituted grievances of fact which lay outside the Court's jurisdiction. In those circumstances it could only record the sovereign character in regard to them of the judgment given by the Sofia Court of Appeal.

[335] A second circumstance is the attitude of the Bulgarian authorities immediately following the birth of the dispute. In his letter of August 3rd, 1937, to the Belgian Minister in Sofia, the Bulgarian Prime Minister and Minister for Foreign Affairs and Public Worship declared that "the matters in

dispute between the Municipality of Sofia and the Belgian Electricity Company fall within the exclusive jurisdiction of the Bulgarian courts, which have already given their decision upon them". In the same letter the Bulgarian Government justified its decision to denounce the Treaty of June 23rd, 1931, on the ground that the Belgian Government intended to submit to the Permanent Court of International Justice "a dispute which falls within the competence of the Bulgarian courts". [p139]

[336] Finally, it is established that the Belgian Company, being bound to exhaust the local remedies, did all that lay in its power to this end by having recourse, on June 23rd, 1937, to the exceptional means of an appeal to the Court of Cassation, and it is further agreed that the filing of the Belgian Application on January 26th, 1938, was determined by the imminent expiry of the Treaty which had been denounced by the Bulgarian Government and the benefit of which the Belgian Government was attempting to preserve. In these circumstances, was it necessary, on the basis of the Treaty, to declare the Belgian Government's Application irregular, because it preceded the judgment of the Bulgarian Court of Cassation ? In my opinion, the circumstances briefly outlined above and the general spirit of the Treaty justified a less formal attitude towards a procedure whose only fault lay in its having been precipitated by the denunciation of the Treaty, while that denunciation, taking effect on February 4th following, deprived the Belgian Government, in advance, of the benefit of the appeal lodged by its national with the Court of Cassation and which alone, according to the argument of the Court's judgment, could lead to the "decision with final effect" required by Article 3 of the Treaty of June 23rd, 1931.

(Signed) De Visscher. [p140]

Separate Opinion of M. Erich.

[Translation.]

[337] Although I agree with the operative part of the Court's judgment, I regret that I have been unable to concur on every point in its arguments. I think therefore I ought briefly to state my dissenting opinion..

[338] The two sources invoked by the Parties as binding upon them, namely their declarations accepting the compulsory jurisdiction of the Court and the Treaty of 1931 for as long as it continued in force, indicated between them the extent of the mutual obligation of both Parties to submit their disputes to the Permanent Court of International Justice. There is no doubt that this mutual obligation based upon the declarations was in a certain measure extended by the conclusion of the Treaty.

[339] Disregarding for the moment the argument *ratione materiae* invoked by the Bulgarian Government in a very general and even rather diffuse form, which argument the judgment has rightly held not to be a preliminary objection, I find that the Bulgarian Government, while disputing the justice of the Belgian Government's arguments in favour of the Court's jurisdiction, asks the latter "to declare that it has no jurisdiction to entertain the Application filed" and further declares "that the Application submitted by Belgium to the Permanent Court of International Justice cannot be entertained".

[340] The question whether the Bulgarian Memorial, when it speaks either of "questions of

jurisdiction and admissibility" or of "the question of jurisdiction and admissibility", intended to raise a single objection implying two objections, or two different objections, is of no decisive importance.

[341] Bulgaria disputed the treaty bases of the Court's jurisdiction, alleging generally the absence of any international element in the present dispute and advancing, in the second place, with regard to the declarations, the objection *ratione temporis*. The objection based upon Article 3 of the 1931 Treaty and disputing the admissibility of the Application, is of a different character. A party who argues that an application cannot be entertained is not maintaining thereby that the subject of the dispute does not fall within the competence of the court in question; it is adducing a certain circumstance which in its opinion constitutes an obstacle to proceedings. The same is true when the party invokes the non-exhaustion of local [p141] remedies or the absence of diplomatic negotiations, both cases creating a gap which does not affect the jurisdiction of the Court as recognized by the parties in question.

[342] An objection to jurisdiction and an objection to admissibility are not therefore mutually exclusive. They may co-exist and should be examined separately, even when the same party has impugned both jurisdiction and admissibility. The fact that the party raising the objections has apparently confused them is of no importance, provided that the distinction emerges in fact from its claims.

[343] The objection to jurisdiction is obviously a preliminary objection in relation to the objection to admissibility. If the Court finds that it has no jurisdiction, the objection to admissibility lapses, having lost its *raison d'être* ; if, on the other hand, the Court declares in favour of its jurisdiction, it has not thereby affirmed that the application can be entertained.

[344] Accordingly, if we are confronted with an objection to jurisdiction and an objection to admissibility, we should begin by examining the question of jurisdiction proper. If jurisdiction is not admitted, the whole case falls to the ground and the objection to admissibility ceases to have any relevance. In the opposite case the force of the objection to admissibility is unimpaired and remains to be examined separately. The same is obviously true when it is found that an objection to the jurisdiction of the Court is closely bound up with the merits of the dispute ; the jurisdiction is here too preserved, at least for the time being.

[345] The objection relating to exhaustion of internal remedies is indivisible. The Party who advances this objection does not mean that, from the point of view of the Treaty, these remedies are not exhausted, but that, from another point of view, that of the declarations, the objection based on exhaustion does not operate. The remedies are either exhausted or they are not. Once the objection based on alleged non-exhaustion is found to be just, it is impossible to cancel the effects of that finding by admitting also that the jurisdiction of the Court is established. The establishment of jurisdiction does not of itself suffice to rule out the objection to the application being entertained.

[346] The argument *ratione materiae*, that is to say the general and somewhat diffuse objection whereby the Bulgarian Government seeks to exclude the Court's jurisdiction, was rightly denied to be a preliminary objection and was reserved for [p142] examination with the merits. The objection

ratione temporis, which likewise challenges the jurisdiction of the Court, is logically subordinate to the objection *ratione materiae* in the sense that, should the latter be subsequently approved by the Court, the argument *ratione temporis* would lose its *raison d'être* and become inoperative. If we find that the case is not a dispute in the international sense, the question of priority, or otherwise, of date would no longer arise.

[347] But since the Court has already examined the argument *ratione temporis*, I should like to offer a few observations on this subject.

[348] The reservation *ratione temporis* inserted in many international undertakings appears in different terms. When we exclude "disputes which have their origin in facts prior to the present Convention", that expression appears perhaps more restricted than the words used in the Belgian declaration : "disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification" ; fundamentally there is little difference between the intentions of the contracting States. Any dispute caused by facts or measures of a legal character prior to a certain decisive and crucial date are excluded from the application of the rule. Such formulae may be criticised as inexact and likely to cause confusion, but they must be given the meaning which the contracting Parties had in mind.

[349] During the first stage of the present dispute, both Parties apparently considered the origin of their dispute to lie in the formula contained in the award of the Mixed Arbitral Tribunal of 1925. The Belgian Application (p. 4), in telling the story of past events, speaks of the tariff formula fixed by the Arbitral Tribunal. Until 1934 the application of this formula gave rise to no difficulties, but disagreement arose for the first time in the last quarter of that year. The compromise arranged for 1935 was not prolonged, "and the dispute again arose with regard to calculating the tariff for the first quarter of 1936". In its Additional Memorial (p. 8) the Belgian Government indicates as follows what it regards as the criterion in order that the reservation in the Belgian declaration may apply: "... it is not enough that the dispute arising subsequently to this declaration should have some relation with a situation in law or of fact prior thereto; the dispute must arise with actual regard to that situation". The same phrase "with regard to" is therefore found both in this general and abstract formulation of the rule and in the above-mentioned sentence in the Application which deals with the tariff formula fixed by the Arbitral Tribunal. In the Belgian Government's Memorial (p. 14) the formula fixed by this Tribunal is called "the disputed formula". [p143] From these expressions and from several others it would appear that the Belgian Government in the first stage of the dispute regarded certain alleged acts by the Bulgarian authorities to be the subject-matter of the dispute, but held the formula to be the source of it, in other words, the situation with regard to which the dispute arose.

[350] If the Mixed Arbitral Tribunal had complied with the Company's request when asked to give an interpretation of the arbitral award of May 27th, 1925, the dispute submitted to this Tribunal would obviously have been a dispute directly with regard to the arbitral award,. And the same is true when the Bulgarian courts were required to adjudicate upon the matter. The salient point upon which their discussions turned was precisely "the disputed award" of 1925. As the decisions by the courts failed to satisfy the Company, the protecting State, Belgium, applied to the Court. It is certainly not "the disputed formula" as such which was submitted to the examination of the Court. If it were so, this formula would have to be regarded as the actual subject of the dispute. The Belgian complaints

are directed against certain acts of the Bulgarian authorities, and it is these acts which constitute the subject of the dispute ; it was they which occasioned it. Essentially, however, they obviously assume the existence of prior situations or facts (cf. the Court's judgment in the case of the Moroccan Phosphates, p. 24). The dispute derives from facts prior to March 10th, 1926. The disputed award constitutes a situation prior to the crucial date. That prior situation gave birth to differences of opinion that arose subsequently to that date.

[351] If taken in a very limited sense, the *ratione temporis* reservation, emphasized by many countries in their declarations, might become almost void of substance. Alleged damage suffered before the entry into force of the undertaking could be resuscitated by a claim submitted to some national judicial or administrative authority subsequently to the crucial date. The final dismissal of the claim could then be alleged as an unlawful act and as the element giving birth to the dispute. In this way the interested party would be enabled to revive a dispute to which, under the reservation, the convention ought not to apply.

[352] For the reasons given above, I am inclined to regard the present dispute as having arisen with regard to a situation prior to ratification of the declaration. But the *ratione temporis* reservation operates only within the limits of that declaration ; it was not inserted in the 1931 Treaty, which was still in force at the time when the case was submitted to the [p144] Court. Since the Court has adjudicated upon the *ratione temporis* objection before giving any decision in regard to the preliminary *ratione materiae* objection, I must declare at this stage that the distinction according to whether the dispute is prior or subsequent to a certain date does not apply in so far as concerns the 1931 Treaty.

[353] The Court has admitted the justice of the Bulgarian objection based on failure to exhaust internal remedies. The Application must therefore be regarded as inadmissible. According, however, to the view that prevailed, the force of this finding is invalidated by the fact that the Court's jurisdiction is accepted on the basis of the declarations of adherence to the optional clause. Even if the contrary conclusion had prevailed, the admission of the dispute as having arisen with regard to a situation subsequent to ratification would have meant that Belgium would still have the right to submit to the Court a fresh application on the basis of the mutual declarations.

[354] In these circumstances, I can be brief on the question of exhaustion. I would only say that the conditions required under Article 3 of the 1931 Treaty were not fulfilled at the time when the Belgian Government applied to the Court. At the same time, the local redress rule, even if established in a treaty clause, is not incompatible with certain departures from it, although these, unlike the rule itself, are not laid down in a written text. There are reasons for weighing the merits of an alleged departure from the rule and for taking account of what appears reasonable in a particular case. The Treaty of 1931, which requires that pacific methods of settling international disputes shall be followed as far as is possible, was denounced by one of the Parties at the moment when the Treaty was about to be applied, and was denounced in order to prevent any examination of the dispute by an international body. Belgium, who was probably not sure of being able to approach the Court on the basis of the declaration, the latter being subject to the *ratione temporis* reservation, was faced with a real

periculum in mora ; the action she took is explained by the abnormal situation created by the denunciation of the Treaty. Furthermore, since the Court of Cassation in Bulgaria delivered its judgment, the internal remedies have in fact been exhausted. [p145]

[355] Although I hold that this objection to admissibility should have been treated separately and independently of the question concerning the extent of the Court's compulsory jurisdiction, I consider that a departure from the local redress rule was in this case justified. On that account, and notwithstanding differences of opinion on certain points, I have been able to concur in the operative part of the judgment.

(Signed) R. Erich. [p146]

Dissenting Opinion by M. Papazoff

[Translation.]

[356] Being unable to concur in the judgment affirming the jurisdiction of the Court under the declarations of Belgium and Bulgaria accepting the compulsory jurisdiction of the Court, I feel that I must briefly record my separate opinion.

[357] Under Article 36, paragraph 2, of the Statute of the Court, Belgium and Bulgaria have undertaken to recognize the compulsory jurisdiction of the Court under the conditions laid down in their declarations of adherence.

[358] Bulgaria's declaration, which was ratified on August 12th, 1921, is as follows : "On behalf of the Government of the Kingdom of Bulgaria, I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Permanent Court of International Justice unconditionally "

[359] Belgium's declaration is as follows : "On behalf of the Belgian Government, I recognize as compulsory, ipso facto and without special agreement, in relations to any other Member or State accepting the same obligation, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court for a period of fifteen years, in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification, except in cases where the Parties have agreed or shall agree to have recourse to another method of pacific settlement."

[360] This declaration was ratified and came into effect on March 10th, 1926.

[361] The Bulgarian declaration makes one condition only, that of reciprocity.

[362] It is however recognized that the limitation embodied in the Belgian declaration applies as between the Parties, in consequence of the condition of reciprocity made in paragraph 2 of Article 36 of the Court's Statute, which is moreover repeated in the Bulgarian declaration.

[363] Accordingly, it is necessary to determine the meaning and scope of the limitation embodied in the declaration of the Belgian Government. This limitation comprises two conditions: (1) the dispute must have arisen after the ratification of the declaration, and (2) the dispute must have arisen with regard to situations or facts subsequent to this ratification.

[364] The Belgian declaration having been ratified on March 10th, 1926, it is that date, which may be called the "material date", which must be taken into account. [p147]

[365] The Belgian declaration is drafted in such a way as to preclude any possibility of retrospective effect. The Court's compulsory jurisdiction is only accepted for the future. In no case can the past be called in question. That is why the condition that the dispute must have arisen after the ratification of the declaration is not enough ; a further condition is necessary, namely that it must not have arisen with regard to situations or facts dating from before such ratification. In the present case, the two Parties agree that the dispute arose after the material date (i.e., after March 10th, 1926).

[366] The Bulgarian Government, however, which has raised an objection to the jurisdiction *ratione temporis*, maintains that the second condition is not fulfilled, because the present dispute has arisen in regard to situations or facts dating from before March 10th, 1926. This objection is, in my opinion, fully established by the particulars furnished in the written proceedings. For the letter of the Belgian Minister of June 24th, 1937, in which he expresses the intention of the Belgian Government to refer the case to the Permanent Court of International Justice, contains the following passage: "After a review of the previous facts, a careful study of the judgment given by the Court of Appeal of Sofia on March 27th last has convinced the Belgian Government that the judicial decision rendered disregarded, notably on two points of fundamental importance, the rights of the Company as defined by the Belgo-Bulgarian Mixed Arbitral Tribunal set up under the Treaty of Neuilly, in its awards of July 5th, 1923, and May 27th, 1925, the strict application of which the Bulgarian Government was bound to ensure under the express terms of an international agreement, namely Article 188 of the Treaty of Neuilly " This letter makes it plain that the dispute arises from the situation established by the Belgo-Bulgarian Mixed Arbitral Tribunal's awards of July 5th, 1923, and May 27th, 1925.

[367] The Belgian Memorial shows no less clearly that the present dispute arose with regard to the situation created by these awards. On page 12 of this Memorial we read : "In view of the disputes which arose with regard to the application of the formula contained in the Mixed Arbitral Tribunal's awards", etc. ; and on page 14: "the experts responsible for the disputed formula" ; on page 22 : "the Belgian Government regards as a misapplication of the Mixed Arbitral Tribunal's award", etc. ; and on page 33 : "The Bulgarian High Courts have upset the very foundations of the whole system worked out by the Mixed Arbitral Tribunal."

[368] This "system worked out" is certainly the "situation" created by the awards of the Mixed Arbitral Tribunal of 1923 and 1925 with regard to which the dispute arose. Without [p148] the "formula" established by the Mixed Arbitral Tribunal there could have been no dispute.

[369] In my opinion, this "situation" and the dispute which arose in 1937 stand in the relation of cause and effect. The Company could not have contended that its rights had been infringed, if the situation created by the awards of 1923 and 1925 had not existed. But this situation dates from

before March 10th, 1926, and I think that that suffices. In my view it is unnecessary that the situation should itself have given rise to the dispute and that it should itself form the subject of a difference of opinion.

[370] No such condition is made in the Belgian declaration. What is laid down is that the dispute must arise, that is to say must be born, after the ratification of the declaration. Furthermore, in order to prevent the declaration from having any retrospective effect, the dispute must have no connection with earlier situations or facts. This condition is contained in the words "with regard to". The essential point is that the past must not be called in question in any way, since the declaration of adherence is only to operate for the future.

[371] I find this interpretation of the words "with regard to" confirmed by the fact that, whenever it was desired to take account of the origin of disputes in earlier facts, this was expressly stated. In the many treaties of conciliation, arbitration and judicial settlement concluded between Belgium and other countries, two different formulae were used to fix the non-retrospective condition. Thus in the treaties concluded between Belgium and Germany, Turkey and Roumania we read: "disputes arising out of events prior to the present Convention and belonging to the past".

[372] On the other hand, the treaties concluded by Belgium with Sweden, Switzerland, Finland, Portugal, Poland and Denmark contain the same expressions as those used in the Belgian declaration accepting the Court's compulsory jurisdiction and specify that the treaty shall only apply to disputes that may arise after the exchange of ratifications with regard to situations or facts prior to that date. In these treaties there is no longer any question of disputes "arising out of" prior events, nor any such words as "dispute arising out of a prior situation".

[373] The fact that the present dispute goes back to a date prior to March 10th, 1926, is also clear from the submissions in the Belgian Memorial, which, in enumerating the damage sustained by the Electricity Company, says "As the result of the judicial decisions rendered, the Company was required to pay to the Municipality of Sofia or to the Bulgarian Treasury : (a) as refund of excise alleged to have been collected under unlawful [p149] conditions from 1925 to 1937", etc. Thus the dispute is concerned with sums received as long ago as 1925.

[374] For the reasons given, I have come to the conclusion that the present dispute, although it arose after the material date of March 10th, 1926, arose with regard to a prior situation created by the awards of the Mixed Arbitral Tribunal given in 1923 and 1925.

[375] I therefore hold that this dispute, by reason of the limitation *ratione temporis* contained in the Belgian declaration, does not fall within the jurisdiction of the Court.

(Signed) Papazoff. [p152]

Annex.

Documents Submitted To The Court.

I. - Documents Filed on Behalf of the Belgian Government

In the course of the written proceedings :

1. Award of the Mixed Arbitral Tribunal of July 5th, 1923.
2. Award of the Mixed Arbitral Tribunal of May 27th, 1925.
3. Award of the Mixed Arbitral Tribunal of October 30th, 1925.
4. Cahier des charges (extracts).
5. Tariff of the Pernik Mines, February 13th, 1924.
6. Tariff of the Pernik Mines, February 14th, 1925.
7. Tariff of the Pernik Mines, June 12th, 1925.
8. Letter of the Electricity Company of Sofia and Bulgaria to the Pernik Mines, No. 707, May 8th, 1929.
9. Letter of the Pernik Mines to the Electricity Company, No. 5734, May 10th, 1929.
10. Letter of the Pernik Mines to the Electricity Company, No. 6627, May 29th, 1929.
11. Letter of the Municipality of Sofia to the Electricity Company, No. 6786, August 10th, 1931.
12. Letter of the Electricity Company to the Municipality of Sofia, No. 1286, October 6th, 1934:
13. Letter of the Municipality of Sofia to the Electricity Company, No. 7584, October 23rd, 1934.
14. Certificate issued by the Pernik Mines, October 24th, 1934.
15. Letter of the Electricity Company to the Municipality of Sofia, No. 1482, November 15th, 1934.
16. Letter of the Pernik Mines to the Municipality of Sofia, No. 28942, November 15th, 1934.
17. Letter of the Municipality of Sofia to the Electricity Company, No. 8599, November 20th, 1934.
18. Letter of the Electricity Company to the Municipality of Sofia, No. 1531, November 26th, 1934.
19. Letter of the Pernik Mines to the Electricity Company, No. 30460, November 26th, 1934.
20. Tariff of the Pernik Mines, December 3rd, 1934.
21. Note presented at a plenary meeting of the Municipality of Sofia, November 30th, 1934.
22. Letter of the Electricity Company to the Municipality of Sofia, No. 1599, December 10th, 1934.
23. Convention of December 1934 fixing the tariff for the year 1935.
24. Letter of the Electricity Company to the Municipality of Sofia, No. 1659, October 29th, 1935.
25. Letter of the Municipality of Sofia to the Electricity Company, No. 12651, December 13th, 1935.
26. Letter of the Electricity Company to the Municipality of Sofia, No. 1958, December 30th, 1935.
27. Letter of the Electricity Company to the Municipality of Sofia, No. 80, January 27th, 1936.
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28. Letter of the Municipality of Sofia to the Electricity Company, No. 824, January 31st, 1936.
29. Letter of the Municipality of Sofia to the Electricity Company, No. 37, January 20th, 1936.
30. Letter of the Electricity Company to the Municipality of Sofia, No. 91, February 1st, 1936.
31. Letter of the Municipality of Sofia to the Electricity Company, No. 130, February 3rd, 1936. '
32. Note verbale No. 840/1456, October 26th, 1935, from the Belgian Minister in Sofia to the Ministry for Foreign Affairs and Public Worship. .
33. Aide-memoire No. 840/1457, October 27th, 1935, annexed to the note verbale No. 840/1456.
34. Note verbale No. 840/117, January 27th, 1936, from the Belgian Legation in Sofia to the

Ministry for Foreign Affairs and Public Worship.

35. Note verbale No. 840/125, January 28th, 1936, from the Belgian Legation at Sofia to the Ministry for Foreign Affairs and Public Worship.
36. Note verbale No. 840/141, February 6th, 1936, from the Belgian Legation in Sofia to the Ministry for Foreign Affairs and Public Worship.
37. Note verbale No. 4714-49-II, February 18th, 1936, from the Ministry for Foreign Affairs and Public Worship to the Belgian Legation in Sofia.
38. Note verbale No. 12438-23-II, May 14th, 1936, from the Ministry for Foreign Affairs and Public Worship to the Belgian Legation in Sofia.
39. Award of the Mixed Arbitral Tribunal of December 29th, 1936.
40. Claim of the Municipality of Sofia against the Electricity Company brought before the Regional Court of Sofia.
41. Answer of the Electricity Company, March 14th, 1936.
42. Decision of the Regional Court concerning the admission of evidence.
43. Judgment of the Regional Court of Sofia upon the objection to the jurisdiction, May 26th, 1936.
44. Judgment of the Regional Court of Sofia of October 24th, 1936.
45. Appeal of the Electricity Company, January 2nd, 1937.
46. Judgment of the Court of Appeal of Sofia, March 27th, 1937.
47. Communique issued by the Mayor (March 28th, 1937) and published in the Sofia daily papers the day following the delivery of the Court of Appeal's judgment and on the eve of the elections.
48. Letter of the Electricity Company to the Municipality of Sofia, No. 475, April 28th, 1937.
49. Certificate drawn up by the officials of the Electricity Company and of the Municipality respecting the restoration of the supply of current to customers (April 29th, 1937).
50. Letter of the Municipality of Sofia to the Electricity Company, No. 2811, April 29th, 1937.
51. Letter of the Electricity Company to the Municipality of Sofia, No. 493, May 5th, 1937.
52. Law regarding income tax of February 3rd, 1936 (extracts).
53. Circular No. 3800 of February 28th, 1936, of the Ministry of Finance.
54. Law amending and supplementing the law of February 3rd, 1936, regarding income tax.
55. Letter of the Electricity Company to the Minister of Finance, May 18th, 1936.
56. Letter of the Belgian Minister in Sofia to M. Kiosseivanofi, President of the Council, No. 840/961, June 24th, 1937.
57. Letter of the Belgian Minister in Sofia to M. Kiosseivanoff, President of the Council, No. 1144, July 30th, 1937.
58. Letter of the Minister for Foreign Affairs and Public Worship to the Belgian Minister in Sofia, No. 19179-46-II, August 3rd, 1937.
59. Letter of the Belgian Minister in Sofia to M. Kiosseivanoff, President of the Council, No. 1163, August 3rd, 1937.
60. Appeal of the Electricity Company to the Court of Cassation, June 23rd, 1937. [p154]
61. Judgment of the High Court of Cassation of Sofia, March 16th, 1938.
62. Decree Law of March 13th, 1938, .respecting the regulation of relations between consumers of electric current and the Electricity Company.
63. Certificate issued by the Pernik Mines, June nth, 1936.
64. Certificate issued by the Pernik Mines, March 17th, 1937.
65. Regulations concerning the creation of Compensation Offices attached to Chambers of Commerce.

66. Bulletin No. 891 (Dec. 25th, 1936) of the Sofia Chamber of Commerce and Industry.
67. Letter of the National Bank of Bulgaria, No. 28900, November 26th, 1936.
68. Letter of the National Bank of Bulgaria, No. 33327, January 4th, 1937.
69. Judgment No. 133, February 5th, 1937, of the High Administrative Court.
70. Various laws concerning excise duties.
71. Regulations concerning the method of assessment and collection of excise duty on electric current used for lighting (Sept. 16th, 1914).
72. Letter of the Municipality of Sofia to the Electricity Company, No. 2044, May 26th, 1928.
73. Letter of the Electricity Company to the Municipality of Sofia, No. 1197, May 29th, 1928.
74. Letter of the Municipality of Sofia to the Electricity Company, No. 2110, June 1st, 1928.
75. Letter of the Electricity Company to the Municipality of Sofia, No. 1300, June 8th, 1928.
76. Letter of the Electricity Company to the Municipality of Sofia, No. 1616, July 18th, 1928.
77. Letter of the Municipality of Sofia to the Electricity Company, No. 3536, July 24th, 1928.
78. Letter of the Municipality of Sofia to the Electricity Company, No. 10652, November 2nd, 1935.
79. Extract from the Judgment of the Court of Cassation, No. 283, of March 25th, 1926, concerning the Rodopi Company.

II. - Documents Filed on Behalf of the Bulgarian Government.

A. - In the course of the written proceedings :

1. Judgment No. 653, October 24th, 1936, of the Regional Court of Sofia.
2. Judgment No. 70, March 27th, 1937, of "the Court of Appeal of Sofia.
3. Judgment No. 177, March 16th, 1938, of the High Court of Cassation of Sofia.
4. Minute of the Bulgaro-Belgian Mixed Arbitral Tribunal, October 30th, 1930.
5. Award of the Bulgaro-Belgian Mixed Arbitral Tribunal, December 29th, 1936.
6. Letter No. 840/568, April 22nd, 1937, from M. Motte, Belgian Minister in Sofia, to M. Kiosseivanoff, President of the Council of Ministers, Minister for Foreign Affairs and Public Worship of Bulgaria.
7. Certificate No. 3875, June 7th, 1938, of the Bulgarian Ministry of Justice.
8. Bulgarian and Belgian declarations adhering to the optional clause concerning the compulsory jurisdiction of the Permanent Court of International Justice.
9. Treaty of conciliation, arbitration and judicial settlement of June 23rd, 1931, between Bulgaria and Belgium.
10. Letter No. 19179-46-II, August 3rd, 1937, from M. Kiosseivanoff, President of the Council of Ministers, Minister for Foreign Affairs and Public Worship of Bulgaria, to M. Motte, Belgian Minister in Sofia. [p155]
11. Letter No. 593, August 3rd, 1937, from M. Miankofi, Bulgarian Charge d'affaires ad interim in Brussels, to M. Spaak, Belgian Minister for Foreign Affairs and Foreign Trade.
12. Letter No. 452/1-438/5406, August 3rd, 1937, from the Belgian Ministry for Foreign Affairs and Foreign Trade to M. Miankoff, Bulgarian Charge d'affaires ad interim in Brussels.

B. - In the course of the oral proceedings :

- Collection of contracts between the Municipality of Sofia and the concessionaires for the supply of electric power and for the Sofia tramways. (Bulgarian and French texts. Sofia, 1930.)

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French construction Company A v Iranian Government organization B, Partial Award, ICC Case No. 3896, 23 December 1982

Partial award of December 23 1982, case no. 3896 (Original In French)

Facts

Arbitration proceedings were in progress between French construction company A and the Iranian Government organization B, based on a contract between them dated September 18, 1977. During the course of the arbitration, B instructed an Iranian bank to make a call under the performance guarantee given by a banking syndicate pursuant to A's contractual obligations. A sought interim relief from the arbitration tribunal in the form of a decision that the bank guarantees were null or had been rendered unenforceable; that the call under them was fraudulent and unjustified; and an order that B suspend any call until a decision was reached on the merits of the dispute. The Tribunal issued a partial award in which it decided to give the decision requested but proposed instead that in order to preserve the *status quo*, the claimant withdraw its allegation of fraud and that the defendant renounce its call under the guarantees, until the arbitration proceedings on the merits of the underlying contract were concluded.

Extract

On the tribunal's jurisdiction:

"The fact that the arbitration tribunal can in no sense, and does not intend to, concern itself with any dispute between the parties to the bank guarantee, does not, however, mean that questions relating to these guarantees, notably whether they are valid or no longer enforceable, between the parties to the present arbitration, cannot be addressed or discussed by the Arbitration Tribunal. ... The fact remains that, between the parties to the contract and to the present arbitration, the rights and obligations of the contractor and the employer necessarily encompass the guarantee of good performance in the execution of the contractor's duties and the conditions of operation.

"From this point of view it is not possible to state that once the contract came into existence, the link between the guarantee and the contract would completely disappear or, more precisely, such an assertion - however correct it [page "47"](#) may be in respect of certain types of bank guarantees taken alone, so-called 'automatic' guarantees, as far as relations between the bank and the beneficiary are concerned - cannot be accepted without more with regard to the principal or underlying contract. We are not concerned here with examining the conditions under which the guarantor, according to the terms of the guarantee, must assess its obligation to honour the demand for payment made by the beneficiary. It is rather a case of evaluating, within the framework of the present arbitration, in which the parties to the underlying contract confront each other, whether the call under the guarantee was well founded or not.

(...)

"[T]he Arbitration Tribunal considers that, if the question of the 'guarantee', as between the giver of the guarantee and the beneficiary, falls entirely outside the scope of the present arbitration, as the defendant submits, the same would not be true in the context of the underlying contract and the relation between the parties to the present arbitration. By its very nature, this issue is not independent and could never be entirely separated from the problems of performance or non-performance of the obligations under the contract; on the contrary, it is clearly an ancillary or necessary aspect thereof.

(...)

"To sum up, it might be the case either that the contract, correctly interpreted, does not impose any condition on the exercise of the right of the Iranian party to make a call under the guarantees in any circumstances; or a termativey that the contract regulates,

Author

› Peter Sanders

Organization

› International Court of Arbitration of the International Chamber of Commerce

Arbitrators/Judges

› Prof. Pierre Lalve (President)
› Prof. Jacques Robert
› Prof. Berthold Goldman

Case date

› 23 December 1982

Case number

› CC Case No. 3896

Parties

› Claimant: French construction Company A
› Defendant: Iranian Government organization B

Key words

› call under performance guarantee by defendant during arbitration proceedings
› appropriate interim relief

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Source

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expressly or implicitly, the exercise of this right by the beneficiary, prohibiting, for example, an abusive or fraudulent claim, or at the least correcting the 'automatic' character of the guarantee vis-à-vis the guarantor by the interposition of the ability which the employer beneficiary would incur towards the contractor who authorised the guarantee of the claim under the guarantees turned out to be unfounded.

"Having regard to these factors, the Arbitration Tribunal considers itself competent to pronounce on these questions as between the parties, and to choose between the different hypotheses once the time comes to do so."

On the appropriate form of interim relief:

"... In the view of the Arbitration Tribunal, what is essential is that the guarantees continue to exist and could be paid to the beneficiary if the need arose, in conformity with what is stipulated in the contract. In abstaining from pursuing a claim under the guarantees and exacting payment from the guarantor, the defendant would not in any way be jeopardising its legal position or its legitimate interests, it seems, while its security remained entirely intact.

"As things stand, it will be recalled that no one can pronounce with total certainty upon whether the claimant had correctly fulfilled its contractual obligations, or whether the defendant was right to consider itself discharged from its own obligations by reason of *force majeure*, or finally whether the contract had been terminated or not and on what date. Taking account, also, of the complexity of the legal issues involved, notably as regards the effects of the contractual obligation to provide a guarantee, and the bank guarantees which were given in fulfilment, it is equally impossible at this stage to decide [page "48"](#), according to the contract and given the relations between the parties, the claim under the guarantees, once-for-all and irrevocable as it was, was justified on the date in question or not. For all these reasons, the best solution, in the Arbitration Tribunal's opinion, would involve the maintenance, in so far as is possible, of the '*status quo ante*', that is, the situation which existed at the moment when Terms of Reference no's. 1 and 2 were signed.

"Nor should it be in the course of an international arbitration such as this, to allow obligations to stand which are as serious as those of the alleged abusive and fraudulent claim under the guarantee by the defendant.

"In conclusion, the Arbitration Tribunal considers that there exists, undeniably, the risk of the dispute before it becoming aggravated or magnified, and that the parties should, in the same spirit of goodwill that they have already demonstrated in signing the Terms of Reference, refrain from any action likely to widen or aggravate the dispute, or to complicate the task of the Tribunal or even to make more difficult, one way or another, the observance of the final arbitral award."

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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
 ARBITRAL TRIBUNAL: DECISION ON REQUEST FOR PROVISIONAL
 MEASURES IN ARBITRATION BETWEEN
AMCO ASIA CORPORATION ET AL. AND INDONESIA*
 [December 9, 1983]

In the matter of the arbitration
 between
 Amco Asia Corp. and others
 and
 the Republic of Indonesia

Decision
 on the
 REQUEST OF THE REPUBLIC OF INDONESIA
 FOR RECOMMENDATION OF PROVISIONAL MEASURES

1. On september 30, 1983, the Republic of Indonesia (the Respondent) filed with the Tribunal a Request for Recommendation of Provisional Measures, concluded by a Submission which reads as follows :

" May it please the Tribunal
 " to recommend as a provisional measure pursuant
 " to Article 47 of the ICSID Convention :
 " That claimants take no action of any kind
 " which might aggravate or extend the dispute
 " submitted to the Tribunal, and in particular
 " that they abstain from promoting, stimulating,
 " or instigating the publication of propaganda
 " presenting their case selectively outside this
 " Tribunal or otherwise calculated to discourage
 " foreign investment in Indonesia. "

*[Reproduced from the text provided to International Legal Materials by Coudert Brothers, attorneys for the claimants. In submitting the decision to I.L.M., they stated: "We believe that the Tribunal's unanimous decision is the product of substantial study by eminent international jurists and that its publication will not only be of interest to the international bar but will serve to advance international law and order generally, and specifically the purposes of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States."

[The Award on Jurisdiction in this arbitration appears at 23 I.L.M. 351 (1984).]

In fact, the Respondent contends that such provisional measures would be justified by an article published on the front page of a Hong Kong news paper, The Business Standard, on June 27, 1983. According to the Respondent, said article, which relates several statements attributed to

Mr. T.K. Tan, " the controlling share-holder of claimants ", about the alleged nationalisation of the Kartika Plaza Hotel, the procedure in the Jakarta Courts and the request for arbitration filed with the ICSID, " recounted a one-sided version of the claimant's story in tones designed " to be detrimental to international perceptions of the climate for foreign " investment in Indonesia ". While admitting that " the publication of a " single article in a journal of such limited circulation hardly could " amount to more than a nuisance ", Respondent contends further that " it " could lead to serious exacerbation of the dispute between the parties and " irreparable harm to the economy of Indonesia ".

In law, Respondent relies on Article 47 of the Convention on the Settlement of Investment Disputes, which enables the Tribunal to " recommend any provisional measures which should be taken to preserve " the respective rights of either party ".

Furthermore, Respondent contends that " Claimants' action is incon- "sistent with Claimants' acceptance of ICSID arbitration 'to the exclusion "'of any other remedy' under article 26 " (of the Convention) " and with " the requirement of good faith which inheres in all international procee- " dings and certainly envelops the parties to an arbitration before the " Centre ".

" Finally ", Respondent alleges, " claimants' actions are incompati- " ble with the spirit of confidentiality which imbues these international " arbitral proceedings ", relying in this respect on several provisions of the Convention (article 48(5)) and of the Arbitration Rules (namely Rules 48(4), 37(2), 6(2), 15 and 31 (2)).

2. On October 28, 1983, claimants filed a Reply to this Request, of which the conclusion reads as follows :

" The Tribunal should refrain from adopting a
" provisional measure such as requested here,
" which is not needed, conflicts with the pro-
" visions of the Rules, is without precedent,
" and would be impossible to police ".

In fact, claimants produce three articles, published in Indonesia in 1982 and 1983, that is to say before the publication of the article in the Hong Kong newspaper. Two of these articles are exhibited with partial translations, that show that they contained a description of the case which was not contrary to the one presented by the Respondent in the arbitral procedure.

Furthermore, claimants allege that the article in the "Business Standard" did no harm to Indonesia, and state that they " bear the country of Indonesia no ill will, have no intention of discouraging foreign investment there, and have no power to do so ".

In law, claimants contend that " the Convention and Arbitration Rules do not prohibit individual parties from discussing the case and the status of the arbitration, publicly or otherwise ". They stress that Respondent did not specify the " rights to be preserved " by the provisional measure it requests, such as required by Rule 39 (1).

Finally, coming back to facts, claimants point out that the order requested " would be impossible to police ", since numerous people in the Indonesian government and shareholders of Amco Asia and Pan American know about the case.

3. The Tribunal finds, as admitted by Respondent, that the article published in the " Business Standard " could not have done any actual harm to Indonesia, nor aggravate or exacerbate the legal dispute now put before the tribunal ; moreover, a careful reading of said article shows that the recital it contains is presented as based on Mr. Tan's supposed statements (however not as an interview), thus not relating facts of which its author warrants the truthfulness. In this respect, it might well be that the descriptions found in the Indonesian

articles produced by claimants could have a stronger influence on the perception of the case by the readers.

Furthermore, claimants rightly point out that Rule 39(1), implementing the very general provision of article 47 of the Convention, requires the party which solicits a provisional measure to specify the rights that such measure would be purported to preserve. Obviously, the rights to which this provision is relating are the rights in dispute, and no such right could be threatened by the publication of articles like those which are produced by both parties. Moreover, it can not be seriously contended that the article in "The Hong Kong Business Standard " may have whatever influence on Indonesia's economy.

It might possibly be that a large press campaign could have such an influence. However, even so, it would not be an influence on rights in dispute ; and at any event, the unique article produced by the Respondent does not permit to suppose that claimants are planning such a campaign.

Nor can this article show any bad faith of the claimants in the arbitral procedure ; and obviously, such an article, would it even be proved that it was " promoted " by the claimants, does not mean that the same rely on any legal remedy other than the ICSID arbitration.

4. Finally, as to the " spirit of confidentiality " of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case ; here again, it should be noticed that the articles published in Indonesia provided the readers with more details on the arbitral procedure than the one published in the " Hong Kong Business Standard ".

5. All these remarks do by no means weaken the good and fair practical rule, according to which both parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exarcebate the same, thus rendering its solution possibly more difficult. However, in the circumstances of the case, the tribunal does not find any symptom

of an intention of the one or the other party to take steps that could have such consequences ; accordingly, the Tribunal does not deem it appropriate to issue a recommendation to the parties - which, moreover, is not requested by claimants - such recommendation not seeming to be presently needed.

6. For the above stated reasons, the Tribunal rejects the Respondent's Request for Recommendation of Provisional Measures.

Done in Paris, this *9th*
day of *December*
1983

On behalf of the Tribunal :
The President of the Tribunal



Professor Berthold GOLDMAN

UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments
as adopted in 2006



The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency; international transport of goods; international payments; procurement and infrastructure development; and security interests. Non-legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and countertrade.

Further information may be obtained from:

UNCITRAL secretariat, Vienna International Centre,
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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments
as adopted in 2006



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40/72. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in international commercial relations,

Convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

Noting that the Model Law on International Commercial Arbitration¹ was adopted by the United Nations Commission on International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,

Convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards² and the Arbitration Rules of the United Nations Commission on International Trade Law³ recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. *Requests* the Secretary-General to transmit the text of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, together with the *travaux préparatoires* from the eighteenth session of the Commission, to Governments and to arbitral institutions and other interested bodies, such as chambers of commerce;

2. *Recommends* that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

*112th plenary meeting
11 December 1985*

¹Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.

²United Nations, *Treaty Series*, vol. 330, No. 4739, p. 38.

³United Nations publication, Sales No. E.77.V.6.

[on the report of the Sixth Committee (A/61/453)]

61/33. Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Recalling its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,¹

Recognizing the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

Believing that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

Noting that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

Believing that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,² is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,³ and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on

¹*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.*

²United Nations, *Treaty Series*, vol. 330, No. 4739.

³*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17).*

International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,² the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;³

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

*64th plenary meeting
4 December 2006*

Part One

UNCITRAL Model Law on International Commercial Arbitration

(United Nations documents A/40/17,
annex I and A/61/17, annex I)

**(As adopted by the United Nations Commission on
International Trade Law on 21 June 1985,
and as amended by the United Nations Commission
on International Trade Law on 7 July 2006)**

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application¹

(1) This Law applies to international commercial² arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

¹Article headings are for reference purposes only and are not to be used for purposes of interpretation.

²The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(b) one of the following places is situated outside the State in which the parties have their places of business:

- (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
- (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;

(b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

(c) “court” means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 2 A. International origin and general principles

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Option I

Article 7. Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not

limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
- (3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

- (4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

- (5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no

appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the

matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders*Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders*

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for

the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures*Article 17 H. Recognition and enforcement*

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement³

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

- (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
- (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
- (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

- (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
- (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

*Section 5. Court-ordered interim measures**Article 17 J. Court-ordered interim measures*

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in

³The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) 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.

(2) 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.

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.

The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. Settlement

- (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

- (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
- (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.
- (3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.
- (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

- (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
 - (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
 - (b) the parties agree on the termination of the proceedings;
 - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
- (3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

- (1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:
 - (a) a party, with notice to the other party, may request the arbitral

tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not

valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the

competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.⁴

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

⁴The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.
- (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Part Two

Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006¹

1. The UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the end of the eighteenth session of the Commission. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended “that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”. The Model Law was amended by UNCITRAL on 7 July 2006, at the thirty-ninth session of the Commission (see below, paragraphs 4, 19, 20, 27, 29 and 53). The General Assembly, in its resolution 61/33 of 4 December 2006, recommended “that all States give favourable consideration to the enactment of the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws (...)”.

2. The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.

3. The form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws. Notwithstanding that flexibility, and in order to increase the likelihood of achieving a satisfactory degree of harmonization, States are encouraged to make

¹This note was prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI — 1985, United Nations publication, Sales No. E.87.V.4).

as few changes as possible when incorporating the Model Law into their legal systems. Efforts to minimize variation from the text adopted by UNCITRAL are also expected to increase the visibility of harmonization, thus enhancing the confidence of foreign parties, as the primary users of international arbitration, in the reliability of arbitration law in the enacting State.

4. The revision of the Model Law adopted in 2006 includes article 2 A, which is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law. Other substantive amendments to the Model Law relate to the form of the arbitration agreement and to interim measures. The original 1985 version of the provision on the form of the arbitration agreement (article 7) was modelled on the language used in article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“the New York Convention”). The revision of article 7 is intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures. The new provisions are contained in a new chapter of the Model Law on interim measures and preliminary orders (chapter IV A).

A. Background to the Model Law

5. The Model Law was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international cases.

1. Inadequacy of domestic laws

6. Recurrent inadequacies to be found in outdated national laws include provisions that equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues. Even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

7. The expectations of the parties as expressed in a chosen set of arbitration rules or a “one-off” arbitration agreement may be frustrated, especially by mandatory provisions of applicable law. Unexpected and undesired restrictions found in national

laws may prevent the parties, for example, from submitting future disputes to arbitration, from selecting the arbitrator freely, or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate. Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Law is intended to reduce the risk of such possible frustration, difficulties or surprise.

2. Disparity between national laws

8. Problems stemming from inadequate arbitration laws or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. Such differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. Obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances often expensive, impractical or impossible.

9. Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration. Due to such uncertainty, a party may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate. The range of places of arbitration acceptable to parties is thus widened and the smooth functioning of the arbitral proceedings is enhanced where States adopt the Model Law, which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems.

B. Salient features of the Model Law

1. Special procedural regime for international commercial arbitration

10. The principles and solutions adopted in the Model Law aim at reducing or eliminating the above-mentioned concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime tailored to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration. States may thus consider extending their enactment of the Model Law to cover also domestic disputes, as a number of enacting States already have.

(a) *Substantive and territorial scope of application*

11. Article 1 defines the scope of application of the Model Law by reference to the notion of “international commercial arbitration”. The Model Law defines an arbitration as international if “the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States” (article 1 (3)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, article 1 (3) broadens the notion of internationality so that the Model Law also covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law.

12. In respect of the term “commercial”, the Model Law provides no strict definition. The footnote to article 1 (1) calls for “a wide interpretation” and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, “whether contractual or not”. The purpose of the footnote is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of “commercial law” that may exist in some legal systems.

13. Another aspect of applicability is the territorial scope of application. The principle embodied in article 1 (2) is that the Model Law as enacted in a given State applies only if the place of arbitration is in the territory of that State. However, article 1 (2) also contains important exceptions to that principle, to the effect that certain articles apply, irrespective of whether the place of arbitration is in the enacting State or elsewhere (or, as the case may be, even before the place of arbitration is determined). These articles are the following: articles 8 (1) and 9, which deal with the recognition of arbitration agreements, including their compatibility with interim measures ordered by a court, article 17 J on court-ordered interim measures, articles 17 H and 17 I on the recognition and enforcement of interim measures ordered by an arbitral tribunal, and articles 35 and 36 on the recognition and enforcement of arbitral awards.

14. The territorial criterion governing most of the provisions of the Model Law was adopted for the sake of certainty and in view of the following facts. In most legal systems, the place of arbitration is the exclusive criterion for determining the applicability of national law and, where the national law allows parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties rarely make use of that possibility. Incidentally, enactment of the Model Law reduces any need for the parties to choose a “foreign” law, since the Model Law grants the parties wide freedom in shaping the rules of the arbitral proceedings. In addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of

arbitration with functions of supervision and assistance to arbitration. It should be noted that the territorial criterion legally triggered by the parties' choice regarding the place of arbitration does not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by article 20 (2).

(b) Delimitation of court assistance and supervision

15. Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

16. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36).

17. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties).

2. Arbitration agreement

18. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts.

(a) Definition and form of arbitration agreement

19. The original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II (2) of the New York

Convention, which requires that an arbitration agreement be in writing. If the parties have agreed to arbitrate, but they entered into the arbitration agreement in a manner that does not meet the form requirement, any party may have grounds to object to the jurisdiction of the arbitral tribunal. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute (“*compromis*”) or a future dispute (“*clause compromissoire*”). It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It covers the situation of “an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another”. It also states that “the reference in a contract to any document” (for example, general conditions) “containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract”. It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made “by reference”. The second approach defines the arbitration agreement in a manner that omits any form requirement. No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

20. In that respect, the Commission also adopted, at its thirty-ninth session in 2006, a “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958” (A/61/17, Annex 2).² The General Assembly, in its resolution 61/33 of 4 December 2006 noted that “in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and

²Reproduced in Part Three hereafter.

Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely”. The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”. In addition, the Recommendation encourages States to adopt the revised article 7 of the Model Law. Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the “more favourable law provision” contained in article VII (1) of the New York Convention, the Recommendation clarifies that “any interested party” should be allowed “to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement”.

(b) Arbitration agreement and the courts

21. Articles 8 and 9 deal with two important aspects of the complex relationship between the arbitration agreement and the resort to courts. Modelled on article II (3) of the New York Convention, article 8 (1) of the Model Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request, which a party may make not later than when submitting its first statement on the substance of the dispute. This provision, where adopted by a State enacting the Model Law, is by its nature binding only on the courts of that State. However, since article 8 is not limited in scope to agreements providing for arbitration to take place in the enacting State, it promotes the universal recognition and effect of international commercial arbitration agreements.

22. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (for example, pre-award attachments) are compatible with an arbitration agreement. That provision is ultimately addressed to the courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a court, it may not be relied upon, under the Model Law, as a waiver or an objection against the existence or effect of the arbitration agreement.

3. Composition of arbitral tribunal

23. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the

general approach taken by the Model Law in eliminating difficulties that arise from inappropriate or fragmentary laws or rules. First, the approach recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice. Secondly, where the parties have not exercised their freedom to lay down the rules of procedure or they have failed to cover a particular issue, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively until the dispute is resolved.

24. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, articles 11, 13 and 14 provide for assistance by courts or other competent authorities designated by the enacting State. In view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics, short time-periods are set and decisions rendered by courts or other authorities on such matters are not appealable.

4. Jurisdiction of arbitral tribunal

(a) Competence to rule on own jurisdiction

25. Article 16 (1) adopts the two important (not yet generally recognized) principles of “*Kompetenz-Kompetenz*” and of separability or autonomy of the arbitration clause. “*Kompetenz-Kompetenz*” means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators’ jurisdiction be made at the earliest possible time.

26. The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

(b) *Power to order interim measures and preliminary orders*

27. Chapter IV A on interim measures and preliminary orders was adopted by the Commission in 2006. It replaces article 17 of the original 1985 version of the Model Law. Section 1 provides a generic definition of interim measures and sets out the conditions for granting such measures. An important innovation of the revision lies in the establishment (in section 4) of a regime for the recognition and enforcement of interim measures, which was modelled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Law.

28. Section 2 of chapter IV A deals with the application for, and conditions for the granting of, preliminary orders. Preliminary orders provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order. Article 17 B (1) provides that “a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested”. Article 17 B (2) permits an arbitral tribunal to grant a preliminary order if “it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure”. Article 17 C contains carefully drafted safeguards for the party against whom the preliminary order is directed, such as prompt notification of the application for the preliminary order and of the preliminary order itself (if any), and an opportunity for that party to present its case “at the earliest practicable time”. In any event, a preliminary order has a maximum duration of twenty days and, while binding on the parties, is not subject to court enforcement and does not constitute an award. The term “preliminary order” is used to emphasize its limited nature.

29. Section 3 sets out rules applicable to both preliminary orders and interim measures.

30. Section 5 includes article 17 J on interim measures ordered by courts in support of arbitration, and provides that “a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in courts”. That article has been added in 2006 to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures.

5. Conduct of arbitral proceedings

31. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18, which sets out fundamental requirements of procedural justice, and article 19 on the rights and powers to determine the rules of procedure, express principles that are central to the Model Law.

(a) *Fundamental procedural rights of a party*

32. Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. A number of provisions illustrate those principles. For example, article 24 (1) provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24 (1) deals only with the general entitlement of a party to oral hearings (as an alternative to proceedings conducted on the basis of documents and other materials) and not with the procedural aspects, such as the length, number or timing of hearings.

33. Another illustration of those principles relates to evidence by an expert appointed by the arbitral tribunal. Article 26 (2) requires the expert, after delivering his or her written or oral report, to participate in a hearing where the parties may put questions to the expert and present expert witnesses to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24 (3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24 (2)).

(b) *Determination of rules of procedure*

34. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a 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.

35. Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise (see above, paras. 7 and 9). The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law.

36. In addition to the general provisions of article 19, other provisions in the Model Law recognize party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language to be used in the proceedings.

(c) Default of a party

37. The arbitral proceedings may be continued in the absence of a party, provided that due notice has been given. This applies, in particular, to the failure of the respondent to communicate its statement of defence (article 25 (b)). The arbitral tribunal may also continue the proceedings where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25 (c)). However, if the claimant fails to submit its statement of claim, the arbitral tribunal is obliged to terminate the proceedings (article 25 (a)).

38. Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

6. Making of award and termination of proceedings

(a) Rules applicable to substance of dispute

39. Article 28 deals with the determination of the rules of law governing the substance of the dispute. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of “rules of law” instead of “law”, the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable.

40. Article 28 (3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeur*. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this area. It simply calls the attention of the parties on the need to provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

(b) Making of award and other decisions

41. In its rules on the making of the award (articles 29-31), the Model Law focuses on the situation where the arbitral tribunal consists of more than one arbitrator. In such a situation, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

42. Article 31 (3) provides that the award shall state the place of arbitration and shall be deemed to have been made at that place. The effect of the deeming provision is to emphasize that the final making of the award constitutes a legal act, which in practice does not necessarily coincide with one factual event. For the same reason that the arbitral proceedings need not be carried out at the place designated as the legal “place of arbitration”, the making of the award may be completed through deliberations held at various places, by telephone or correspondence. In addition, the award does not have to be signed by the arbitrators physically gathering at the same place.

43. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is “on agreed terms” (i.e., an award that records the terms of an amicable settlement by the parties). It may be added that the Model Law neither requires nor prohibits “dissenting opinions”.

7. *Recourse against award*

44. The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based.

That situation (of considerable concern to those involved in international commercial arbitration) is greatly improved by the Model Law, which provides uniform grounds upon which (and clear time periods within which) recourse against an arbitral award may be made.

(a) Application for setting aside as exclusive recourse

45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating “recourse” (i.e., the means through which a party may actively “attack” the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).

(b) Grounds for setting aside

46. As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

47. The approach under which the grounds for setting aside an award under the Model Law parallel the grounds for refusing recognition and enforcement of the award under article V of the New York Convention is reminiscent of the approach taken in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX of the latter Convention, the decision of a foreign court to set aside an award for a reason other than the ones listed in article V of the New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

48. Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36 (1), a practical difference should be noted. An application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).

8. *Recognition and enforcement of awards*

49. The eighth and last chapter of the Model Law deals with the recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.

(a) Towards uniform treatment of all awards irrespective of country of origin

50. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between “international” and “non-international” awards instead of relying on the traditional distinction between “foreign” and “domestic” awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of “international” awards, whether “foreign” or “domestic”, should be governed by the same provisions.

51. By modelling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

(b) Procedural conditions of recognition and enforcement

52. Under article 35 (1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35 (2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

53. The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement under article 35 (2). It was amended in 2006 to liberalize formal requirements and reflect the amendment made to article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under article 35 (2).

(c) Grounds for refusing recognition or enforcement

54. Although the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention, the grounds listed in the Model Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Law. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention. However, the first ground on the list as contained in the New York Convention (which provides that recognition and enforcement may be refused if “the parties to the arbitration agreement were, under the law applicable to them, under some incapacity”) was modified since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.

Further information on the Model Law may be obtained from:

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Part Three

Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,¹ has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference “considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes”,

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

¹United Nations, *Treaty Series*, vol. 330, No. 4739.

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,² as subsequently revised, particularly with respect to article 7,³ the UNCITRAL Model Law on Electronic Commerce,⁴ the UNCITRAL Model Law on Electronic Signatures⁵ and the United Nations Convention on the Use of Electronic Communications in International Contracts,⁶

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

²*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I, and United Nations publication, Sales No. E.95.V.18.

³*Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I.

⁴*Ibid.*, *Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

⁵*Ibid.*, *Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3)*, annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

⁶General Assembly resolution 60/21, annex.

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OCTOBER 27, 1997

**DECISION ON A REQUEST BY THE RESPONDENT
FOR AN ORDER PROHIBITING THE CLAIMANT
FROM REVEALING INFORMATION REGARDING
ICSID CASE ARB/(AF)/97/1**

1. On September 10 1997, the Respondent, the Government of Mexico, requested the Tribunal to issue a formal order declaring that the proceedings are confidential and that breach of such order would permit the Respondent to request the Tribunal to enforce sanctions. The request was expressed as being made pursuant to Article 1134 of the NAFTA and Article 28 of the ICSID Additional Facility Rules. The Respondent's request was communicated to the Claimant for comment and comments were sent to the Tribunal on October 9, 1997.
2. The Respondent complains, first, of a telephone conference call conducted on August 19 1997, by the Chief Executive Officer (C.E.O) of the Claimant which (to use the Respondent's description) "apparently was intended to provide information to shareholders, investment analysts, and other members of the public, who are interested in the Claimants' activities" The C.E.O. first described the formal procedural steps involved in the case and then went on to discuss the content and possible effect of certain newspaper articles, as well as the possibility of a settlement and its terms. The Respondent also complains of what it describes as "a publicity campaign by the Claimant"; of a suggestion, as the Respondent sees it, by the Claimant that steps may be taken under the law of one of the NAFTA Parties to obtain the record of the proceedings; and, finally, of what the Respondent sees as a

serious question as to the Claimants' motives in invoking the NAFTA Chapter Eleven dispute settlement procedure.

3. The Respondent invokes in support of its application certain remarks made by the President of the Tribunal in the course of the first procedural session held on 15 July 1997 which the Respondent interprets as declaring the existence of a general principle of confidentiality of the proceedings. The remarks in question, as transcribed from the tape recording of the session, were as follows:

"So we come to item 7, Records of Hearings, which is governed by the Arbitration Rules, Article Forty-four. And that Article provides that the Secretariat shall keep minutes of hearings and specifies what is expected. It requires the minutes to be signed by myself and the Secretary General, and I note the point that they shall not be published without the consent of the parties. On this point of, if I can put it this way, confidentiality of the proceedings, it is one which is to be borne in mind by all concerned. And then, in the third paragraph of Article Forty-four, it provides that the Tribunal may, and at the request of a party shall, order that the hearings be more fully recorded, in which event certain items may be omitted from the minutes. Now, the current proceedings of today are being fully recorded and, therefore, to that extent the minutes can be abbreviated. But again, I think that there's nothing for us to do except to note that point".

4. The Tribunal considers that the reference in the Minutes to the "confidentiality of the proceedings" cannot by itself be taken as expressing a general requirement that the Parties refrain entirely from every public utterance mentioning the existence, or speculating upon the possible outcome, of the proceedings. Read in their context, the words used by the President, "the confidentiality of the proceedings", are no more than a paraphrase of the words immediately preceding them, namely, that the minutes of the hearing "shall not be published without the consent of the parties". The prohibition must be read as one upon the publication of the contents of any particular minute, except in so far as the minute is merely a restatement of a point

already covered by the content of a public document e.g. the NAFTA itself or the Arbitration (Additional Facility) Rules.

5. Accordingly, the Claimant's mention of the specific time-limits established by the Tribunal for the exchange of written pleadings and for certain subsequent action was not made in accordance with the Rules. However, this departure from the Rules does not appear to the Tribunal to be of major significance. Though as a matter of principle regrettable, it appears, in the circumstances to be *de minimis*. The Tribunal will disregard it, but expresses the hope that no other departures from the Rules will occur.

6. As to the other matters to which the Respondent refers, the Tribunal finds that none of them involve a publication of any aspect of the minutes.

7. The Tribunal notes, however, that the Respondent states that its request is made pursuant to Article 1134 of the NAFTA as well as Article 28 of the ICSTD Additional Facility Rules. The former provision empowers the Tribunal to order interim measures of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective. The latter provision only prescribes that the Tribunal shall make the orders required for the conduct of the hearing. The complaint does not invoke Article 47 of the Additional Facility Rules which deals with provisional measures of protection. Even so, the reference to Article 1134 of NAFTA is sufficient to oblige the Tribunal to consider whether the situation is one requiring an order for provisional measures of protection.

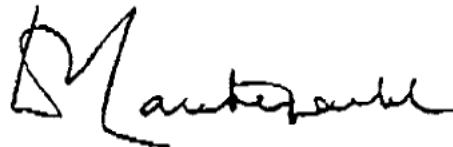
8. In order to succeed in a request for provisional measures an applicant party must demonstrate that the measures are urgently required in order to protect its rights from an injury that cannot be made good by the subsequent

payment of damages. The applicant party here (the Respondent) has in fact alleged that for certain reasons the Claimants' activities "affect the integrity of the process, undermine the Tribunal's jurisdiction and prejudice the Respondents' rights". The Tribunal recalls in this connection the statement made by the Tribunal in the Amco v Indonesia case to the effect that Article 47 of the ICSID Convention "requires that the party that solicits a provisional measure to specify the rights that such measure would be purported to preserve. Obviously, the rights to which this provision is relating are the rights in the dispute, and no such rights could be threatened by the publication of articles like those which are produced by both parties". (See 1 ICSID Reports 410, 411). Though the present case is being conducted under the NAFTA dispute settlement procedures and within ICSID Additional Facility and not under the ICSID Convention, the reasoning applicable to Article 47 of the latter is no less applicable to the wording of Article 1134 of the NAFTA. The Tribunal can find nothing in the Respondent's statement of reasons to support the claim that its rights have suffered prejudice, let alone serious or irreversible damage.

9. There remains nonetheless a question as to whether there exists any general principle of confidentiality that would operate to prohibit public discussion of the arbitration proceedings by either party. Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration. It may be observed that no such limitation is written into such major arbitral texts as the UNCITRAL Rules or the draft Articles on Arbitration adopted by the International Law Commission. Indeed, as has been pointed out by the Claimant in its

Comments, under United States security laws, the Claimant, as a public company traded on a public stock exchange in the United States, is under a positive duty to provide certain information about its activities to its shareholders, especially regarding its involvement in a process the outcome of which could perhaps significantly affect its share value.

10. The above having been said, it still appears to the Tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound.



International Centre for Settlement of Investment Disputes

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún
CLAIMANTS

v.

Plurinational State of Bolivia
RESPONDENT

ICSID Case No. ARB/06/2

DECISION ON PROVISIONAL MEASURES

Rendered by an Arbitral Tribunal composed of:
Prof. Gabrielle Kaufmann-Kohler, President
Hon. Marc Lalonde, P.C., O.C., Q.C., Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Natalí Sequeira

Date: 26 February 2010

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I. SUBJECT MATTER OF THIS DECISION

1. The present decision deals with a Request for Provisional Measures ("Claimants' RPM") filed by Claimants Quiborax S.A. ("Quiborax"), Allan Fosk and Non Metallic Minerals S.A. ("NMM") on 14 September 2009, by which Claimants request that the Arbitral Tribunal:
 - (1) Order Bolivia and/or Bolivia's agencies or entities to refrain from engaging in any conduct that aggravates the dispute between the parties and/or alters the *status quo*, including any conduct, resolution or decision related to criminal proceedings in Bolivia against persons directly or indirectly related to the present arbitration;
 - (2) Order Bolivia and/or Bolivia's agencies or entities to discontinue immediately and/or to cause to be discontinued all proceedings in Bolivia, including criminal proceedings and any course of action relating in any way to this arbitration and which jeopardize the procedural integrity of these proceedings;
 - (3) Order Bolivia and/or Bolivia's agencies or entities to discontinue immediately and/or to cause to be discontinued all proceedings in Bolivia, including criminal proceedings and any course of action relating in any way to this arbitration and which threaten the exclusivity of the ICSID arbitration.¹

2. In their Reply on Provisional Measures ("Claimants' Reply"), Claimants supplemented this request with a fourth request for relief:
 - (4) Order Bolivia and/or Bolivia's agencies or entities to deliver to Claimants the corporate administration of NMM sequestered in the course of the criminal proceedings.²
3. The Plurinational State of Bolivia ("Bolivia" or "Respondent") has objected to Claimants' Request for Provisional Measures and has requested the Tribunal to:
 - (1) Reject Claimants' Request for Provisional Measures;
 - (2) Refrain from adopting the measures that have been requested; and
 - (3) Order Claimants to pay the expenses that Bolivia has had to incur because of their groundless and reckless request.³

¹ Claimants' RPM, p. 22.

² Claimants' Reply, ¶¶ 126.

³ Respondent's Rejoinder, ¶ 81.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Origin of the Dispute and Procedural History

4. The dispute between the Parties originates from the revocation by Presidential Decreto Supremo 27.589 of 23 June 2004 ("D.S. 27.589"), of eleven mining concessions allegedly held by Claimants in Bolivia (the "Bolivian Concessions"). The concessions were held by investment vehicle and co-Claimant NMM. Co-Claimants Quiborax and Allan Fosk, both Chilean nationals, claim to have a 51% majority interest in NMM and a 100% interest in the Bolivian Concessions.
5. Claimants allege that the revocation of the Bolivian Concessions was a confiscatory measure. Claimants state that D.S. 27.589 revoked the Bolivian Concessions for alleged violations of Bolivian law, on the basis of Law 2.564 of 9 December 2003 ("Law 2.564"), which Claimants allege was tailor-made to authorize the Executive to annul Claimants' concessions retroactively. Claimants also claim that D.S. 27.589 applied Law 2.564 incorrectly, because the Executive's authority to annul had expired on 9 February 2004, and thus D.S. 27.589 is unlawful under domestic Bolivian law.
6. Claimants allege that D.S. 27.589 violates Claimants' rights as foreign investors in Bolivia under the *Acuerdo entre la República de Bolivia y la República de Chile para la Promoción y Protección Recíproca de Inversiones* (the "BIT"). On 22 July 2004, Claimants requested friendly consultations in accordance with Art. X of the BIT. This request did not lead to a resolution of the dispute, and on 4 October 2005, Claimants filed a Request for Arbitration before ICSID, which was registered on 6 February 2006.
7. In their Request for Arbitration, Claimants asked the Tribunal to declare that Bolivia breached: (i) Art. VI of the BIT by depriving Claimants of their investment in Bolivia; (ii) Art. IV of the BIT by not providing Claimants fair and equitable treatment; and (iii) Art. III of the BIT by not protecting Claimants' investment in Bolivia and submitting Claimants to unreasonable and discriminatory measures. Claimants requested compensation of all damages suffered as a consequence of these violations, plus interest, as well as all costs of arbitration and all other costs incurred as a consequence of Bolivia's allegedly unlawful acts.
8. The dispute continued to escalate after Claimants' request for friendly consultations. Bolivia set up an inter-ministerial task force to evaluate the merits of Claimants' claims. In an internal memorandum dated 8 December 2004 (the "2004 Memo"), the task force concluded that D.S. 27.589 suffered serious legal defects and that the case was about

to become an international predicament for Bolivia.⁴ The task force outlined different scenarios to aid Bolivia's defense strategy, recommending as the "best alternative" to try to demonstrate the existence of flaws in the processing of the concessions.⁵

9. On 28 October 2004, the Bolivian Mining Superintendency annulled the already revoked concessions.⁶ At the same time, Claimants allege that Bolivia submitted NMM to multiple tax investigations. By November 2007, Claimants state that NMM had been ordered to pay approximately US\$ 1,200,000 in alleged taxes and fines.
10. During this period, the Parties engaged in prolonged negotiations. Following constitution of the Tribunal on 19 December 2007, on the day of the first Procedural Session on 20 March 2008, the Parties communicated to the Tribunal that they had reached an oral settlement agreement. Upon request from the Parties, the proceedings were suspended.
11. Nine months later, Bolivia initiated criminal actions against several persons related directly or indirectly to the present arbitration, including co-Claimant Allan Fosk. Claiming that Bolivia had repudiated the oral agreement, on 14 January 2009 Claimants requested the Tribunal to resume the arbitration.
12. By Procedural Order No. 1 of 5 March 2009, the Tribunal set the calendar for the Parties' presentations. After certain changes requested or agreed by the Parties, by letter of 17 September 2009 the Tribunal amended the procedural schedule as follows:
 1. On or before **14 September 2009**, the Claimants shall file their Memorial.
 2. At its option, the Respondent shall file either:
 - 2.1 Objections to the jurisdiction of the Tribunal by no later than **15 January 2010**; or
 - 2.2 A Counter-memorial on the merits by no later than **15 January 2010**.

Proceedings following paragraph 2.1 above:
 3. On or before **16 April 2010**, the Claimants shall file their Counter-memorial on jurisdiction.
 4. On or before **18 June 2010**, the Respondent shall file its Reply on jurisdiction.
 5. On or before **20 August 2010**, the Claimants shall file their Rejoinder on jurisdiction.

⁴ See 2004 Memo (Annex CPM-5), p. 11.

⁵ *Id.*, pp. 10-11.

⁶ See Writs of Annulment (Annex CPM-6).

6. On **23 September 2010**, the Tribunal will hold a hearing on jurisdiction in Paris, at a location to be later specified. On a date to be later determined but at least two weeks before the hearing on jurisdiction, the Tribunal will hold a pre-hearing telephone conference to address any outstanding issues relating to the forthcoming hearing.
7. Thereafter, the Tribunal will issue a decision or award on jurisdiction and, if applicable, a procedural order on the continuance of the proceedings on the merits, it being specified that, in this latter case, the Respondent will be required to submit its Counter-memorial on the merits no later than four months from the date of the said procedural order.

Proceedings following paragraph 2.2 above:

8. On or before **15 March 2010**, the Claimants shall file their Reply on the merits.
 9. On or before **17 May 2010**, the Respondent shall file its Rejoinder on the merits.
 10. On **22 to 26 June 2010** (the exact number of days being determined during the pre-hearing telephone conference), the Tribunal will hold a hearing on the merits and, if applicable on jurisdiction, in Paris, at a location to be later specified. On a date to be later determined but at least two weeks before said hearing, the Tribunal will hold a pre-hearing telephone conference to address any outstanding issues relating to the forthcoming hearing.
13. On 14 September 2009, Claimants submitted their Memorial, simultaneously with a Request for Provisional Measures.
 14. By letter of 22 September 2009, the Tribunal invited Respondent to submit its observations on Claimants' Request for Provisional Measures by 13 October 2009. On 23 September 2009, Respondent requested an extension to submit its observations. The Tribunal invited Claimants to comment on this request by 5 October 2009.
 15. On 2 October 2009, Claimants filed a request for a "temporary restraining order." On that same date, the Tribunal invited Respondent to provide its observations by 5 October 2009.
 16. On 5 October 2009, after receiving Respondent's observations, the Tribunal denied Claimants' request for a "temporary restraining order" and, based on the circumstances surrounding Claimants' latest request, denied Respondent's request for an extension to submit its observations on Claimants' Request for Provisional Measures. The Tribunal invited the Parties to submit brief rebuttals on 21 October 2009 and 29 October 2009, respectively.
 17. On 14 October 2009, Respondent filed its Objection to Claimants' Request for Provisional Measures ("Respondent's Objection"). On 21 October 2009, Claimants filed their Reply, and on 29 October 2009 Respondent filed its Rejoinder.

18. On 24 November 2009, the Tribunal and the Parties participated in a telephone conference where the Parties supplemented their written submissions. The following persons participated in the telephone conference:

Members of the Tribunal

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal

Professor Brigitte Stern, Arbitrator

Hon. Marc Lalonde, Arbitrator

ICSID Secretariat

Ms. Natalí Sequeira, Secretary of the Tribunal

Representing Claimants

Mr. Allan Fosk, Claimant

Mr. Andrés Jana, Bofill Mir & Álvarez Hinzpeter Jana

Mr. Jorge Bofill, Bofill Mir & Álvarez Hinzpeter Jana

Ms. Johanna Klein Kranenberg, Bofill Mir & Álvarez Hinzpeter Jana

Ms. Dyalá Jiménez F., Bofill Mir & Álvarez Hinzpeter Jana

Mr. Sebastián Yanine, Bofill Mir & Álvarez Hinzpeter Jana

Representing Respondent

Ms. María Cecilia Rocabado Tubert, Minister of Legal Defense of the State

Mr. Javier Antonio Viscarra, Vice-Minister of Legal Defense of the State

Mr. Alfredo Mamani, Director for Jurisdictional and Arbitral Defense

Mr. Paul Reichler, Foley Hoag LLP

Mr. Ronald E.M. Goodman, Foley Hoag LLP

Mr. Alberto Wray, Foley Hoag LLP

Mr. Diego Cadena, Foley Hoag LLP

19. At the telephone conference, the Tribunal heard the Parties' oral arguments. A transcript was made and distributed to the Parties.
20. By letter of 5 January 2010, Foley Hoag LLP informed the Tribunal that it no longer represented Respondent.

21. On 15 January 2010, Respondent requested a 30-day extension to submit its Objections to jurisdiction or its Counter-memorial on the merits, which the Tribunal granted. Respondent requested another 60-day extension to submit either of these pleadings on 12 February 2010. This time the Tribunal granted an extension only until 24 March 2010. At the date of issuance of this Decision, the procedural calendar described in paragraph 12 above had been extended approximately 2 months.

B. Facts Underlying the Request for Provisional Measures

22. The facts described below are based on the Parties' submissions but reflect the Tribunal's review of the record. As a result, they are presented in the manner that the Tribunal considers most intelligible. The findings of fact are made on the basis of the record as it presently stands; nothing herein shall preempt any later finding of fact or conclusion of law.

1. NMM's corporate audit

23. On 18 January 2005, six months after Claimants' request for friendly consultations and one month following the issuance of the 2004 Memo, the *Superintendencia de Empresas* ordered a corporate audit of NMM. The audit was carried out by employees of the *Superintendencia*, Ms. Lorena Fernández and Mr. Yury Espinoza. According to the testimony of Lorena Fernández, this audit was directed to establish whether NMM's shareholders were Chilean nationals.⁷ The audit appears to have been ordered at the request of the Ministry of Foreign Affairs.⁸
24. During the course of the audit, Ms. Fernández and Mr. Espinoza reviewed copies of the shareholders' registry and other corporate documents, including copies of minutes of board and shareholders' meetings. The company had stated that the original corporate documents were not available because they were in Chile, and the *Superintendencia* allowed the company to provide copies. The report that ensued from the audit ("Informe 001/2005" of 11 February 2005) noted that, according to NMM's shareholders' registry, NMM's shareholders were Quiborax, with 13,636 shares, David Moscoso, with 13,103 shares, and Allan Fosk, with one share.⁹ With respect to investment by Chilean nationals, the report concluded that the Chilean company

⁷ See Minutes of Informative Declaration before the Prosecutor as Means of Defense of Ms. María Mónica Lorena Fernández Salinas, Case No. 9394/08, 14 January 2009 ("Declaration of Lorena Fernández", Annex CPM-37).

⁸ See Declaration of Lorena Fernández (Annex CPM-37) and correspondence between the Ministry of Foreign Affairs and the *Superintendencia de Empresas* regarding NMM's corporate inspection (Annex CPM-48).

⁹ Informe 001/2005 (Annex CPM-14), p. 3.

Quiborax had acquired 26,680 shares in NMM from Compañía Minera Río Grande Sur S.A. ("RIGSSA") on 17 August 2001 (part of which were later transferred to David Moscoso), and thus this investment was protected by the BIT.¹⁰ The report also concluded that the corporate documentation showed signs of improper handling and care.¹¹ Finally, the report contained certain recommendations with respect to Bolivia's defense strategy in the ICSID arbitration triggered by the revocation of NMM's mining concessions (that is, the present arbitration). These recommendations included: (i) analyzing the potential unconstitutionality of Law 1854, which would render the granting of the mining concessions null and void; (ii) establishing whether Quiborax had paid for the acquisition of its shares in NMM from RIGSSA, and thus made an effective investment in Bolivia, and (iii) taking the necessary steps to declare the annulment of the public deed whereby RIGSSA – original owner of the Bolivian Concessions – had contributed those Concessions to NMM, thus rendering Quiborax's purchase of RIGSSA's shares in NMM invalid as well.¹²

25. Informe 001/2005 does not appear to have been questioned by the *Superintendencia de Empresas* at the time of its issuance. Nonetheless, on 10 October 2008, the Minister of the State's Legal Defense requested the *Superintendente* to once again review the file on NMM and certify if there were any irregularities that could give rise to the annulment of NMM's corporate acts or the annulment of the company's incorporation.¹³
26. On 17 October 2008, the *Superintendente de Empresas* confirmed the findings of Informe 001/2005 and denied the existence of any irregularities that could give rise to the annulment of the company's acts, certifying, among other things, the shareholder composition of NMM, consisting of Quiborax, David Moscoso and Allan Fosk.¹⁴

2. The criminal proceedings

27. Despite the certification issued by the *Superintendencia de Empresas* on 17 October 2008, Bolivian authorities continued to review Claimants' corporate documentation

¹⁰ *Id.*, p. 6.

¹¹ *Id.*, p. 6.

¹² *Id.*, pp. 6-7.

¹³ See Letter from Héctor E. Arce, Ministry of State's Legal Defense to Rolando Morales, *Superintendencia de Empresas*, 10 October 2008 (Annex CPM-49).

¹⁴ See Letter from Rolando Morales, *Superintendencia de Empresas*, to Héctor E. Arce, Ministry of State's Legal Defense, and the attached certification dated 17 October 2008. (Annex CPM-49).

registered in Bolivia's Commercial Register, and noted the existence of certain irregularities in NMM's corporate documentation.¹⁵

28. Specifically, the Bolivian government discovered the existence of the minutes of a shareholders' meeting of NMM dated 11 September 2001,¹⁶ which had not been provided during the audit, and which contained a different list of shareholders from that included in the minutes of a meeting allegedly held 2 days later, on 13 September 2001.¹⁷ Both minutes had almost identical content, but while the minutes of 11 September 2001 stated that the shareholders of NMM were Fernando Rojas, Gilka Salas, Dolly Paredes and RIGSSA, the minutes of 13 September 2001 stated that the shareholders of NMM were Allan Fosk, Empresa Química Industrial del Bórax S.A. (currently Quiborax) and David Moscoso Ruiz.
29. According to Bolivia, the existence of these two contradictory documents, seen jointly with other corporate documents of NMM, suggests that the minutes of 13 September 2001 may have been forged.¹⁸ Based on this suspicion, on 8 December 2008, the *Superintendente de Empresas* presented a criminal complaint against the following persons:¹⁹
- (i) Co-Claimant Allan Fosk;
 - (ii) David Moscoso, Claimants' Bolivian business partner;
 - (iii) Fernando Rojas and María del Carmen Ballivián, former legal counsel of Claimants;
 - (iv) Daniel Gottschalk, attorney at Guevara & Gutiérrez, current legal counsel of Claimants;
 - (v) Dolly Teresa Paredes de Linares and Gilka Salas Orozco, employees of Estudio Rojas;
 - (vi) María Mónica Lorena Fernández Salinas and Yury Alegorio Espinoza Zalles, the two (now former) employees of the *Superintendencia de Empresas* who authored Informe 001/2005; and

¹⁵ Respondent's Objection, ¶¶ 21-29.

¹⁶ Minutes of NMM's Shareholders Meeting dated 11 September 2001 (Annex 8 to Respondent's Objection).

¹⁷ Minutes of NMM's Shareholders Meeting dated 13 September 2001 (Annex 7 to Respondent's Objection).

¹⁸ Respondent's Objection, ¶ 29.

¹⁹ See for all accusations, Criminal Complaint of 8 December 2008, Case N° 9394/08 ("Querrela Criminal", Annex CPM-09). María del Carmen Ballivián was added to the list of persons under investigation on 14 April 2009. See Correction of Extension of Criminal Complaint, 14 April 2009 ("Querrela Modification," Annex CPM-10).

- (vii) Tatiana Giovanna Terán de Velasco and Ernesto Ossio Aramayo, two Notaries Public whose services NMM had used.
30. The accusation underlying the criminal prosecutions (which have been identified as Case Nº 9394/08) is that some of the persons listed above forged the minutes of 13 September 2001 (replacing what Bolivia deems to be the real minutes, those of 11 September 2001), while others improperly used such forged document. Specifically, Bolivia accuses the persons listed above of the following crimes:²⁰
- (i) Allan Fosk, David Moscoso, Fernando Rojas, and Dolly Paredes are accused of four different crimes: (i) *falsedad ideológica* (forgery) in accordance with Art. 199 of the Bolivian Penal Code ("BPC"); (ii) *uso de instrumento falsificado* (use of forged document); Art. 203 BPC; (iii) *estafa* (fraud), Art. 335 BPC; and (iv) *destrucción de cosas propias para defraudar* (destruction of personal property to defraud), Art 339 BPC;
 - (ii) María del Carmen Ballivián is accused of *falsedad ideológica* and *uso de instrumento falsificado*;
 - (iii) Daniel Gottschalk was accused of *uso de instrumento falsificado* only;
 - (iv) Isaac Frenkel of *destrucción de cosas propias para defraudar*;
 - (v) Lorena Fernández, Yury Espinoza, Ernesto Ossio, and Tatiana Terán are all accused of *incumplimiento de deberes* (dereliction of duties), Art. 154 BPC;
 - (vi) Gilka Salas is mentioned among the persons accused but has not been accused of any crime in particular.
31. Bolivia's reasons to suspect this forgery are, among others:²¹
- (i) The minutes of 11 September 2001 were inserted into a public deed and used several times in the following years to grant powers of attorney for the company, which suggests that the minutes of 11 September 2001 are the real minutes, while the minutes of 13 September 2001 were created *ex post facto*.²²
 - (ii) The minutes of 11 September 2001 indicate that one of the shareholders was RIGSSA, which according to the Shareholders' Registry had transferred its shares to Quiborax on 17 August 2001. Bolivia also claims that this transfer was in breach of NMM's corporate bylaws, as they provided for a right of first refusal to the remaining shareholders that Bolivia claims was not respected.²³

²⁰ See Querella Criminal (Annex CPM-9) and Querella Modification (Annex CPM-10).

²¹ Respondent's Objection, ¶¶ 22-29. See Public Instrument No. 523/2001, September 20, 2001 (Exhibit 9 to Respondent's Objection) Public Instrument 291/2002, July 1, 2002 (Exhibit 10 to Respondent's Objection); NMM's Shareholders Registry dated January 27, 2009 (Exhibit 11 to Respondent's Objection); NMM's Bylaws (Exhibit 12 to Respondent's Objection).

²² See, e.g., Annexes 9 and 10 of Respondent's Objection.

²³ There is contradictory evidence on this point – Claimants attach the minutes of a shareholders meeting held 17 August 2001 that authorizes the transfer in the presence of all shareholders. See Minutes of NMM's shareholders meeting dated 17 August 2001 (Annex CPM-40).

- (iii) According to Bolivia, Dolly Paredes's signature in the minutes of 13 September 2001 does not match her signature in other documents.²⁴
 - (iv) Bolivia also asserts that co-Claimant Allan Fosk was not in Bolivia on 13 September 2001.²⁵
32. Bolivia finds support for this allegation of forgery in other inconsistencies found in NMM's corporate documentation that shed doubts on the validity of Quiborax's acquisition of shares, namely:
- (i) Quiborax allegedly acquired its shares from RIGSSA on 17 August 2001.²⁶ This acquisition was reflected in the minutes of NMM's shareholders' meeting of 17 August 2001.²⁷ However, the minutes of such meeting were formalized in the presence of a notary only on 26 November 2004, more than three years after the meeting was supposedly held.²⁸
 - (ii) In addition, RIGSSA had only recently acquired the shares it allegedly transferred, and Bolivia contends that such acquisition was not legally complete when RIGSSA transferred those shares to Quiborax. Bolivia's argument in this respect can be summarized as follows, although it must be noted that Bolivia's statement of the facts contains certain errors, in particular with respect to dates:
 - (a) NMM's shareholders approved RIGSSA's entry as a new shareholder and NMM's capital increase by means of RIGSSA's contribution in kind of seven mining concessions on 3 August 2001.²⁹ This capital increase was formalized by public deed dated 10 August 2001.³⁰ Bolivia alleges that NMM requested the Commercial Registry to record this capital increase on 21 August 2001, when allegedly RIGSSA was no longer a shareholder in NMM.³¹
 - (b) Bolivia also alleges that, pursuant to Bolivian law, NMM's capital increase had to be authorized by the Commercial Registry. This authorization, which according to Bolivia was a prerequisite for the issuance of NMM's shares, was only granted on 28 August 2001.³² In other words, the alleged transfer of shares from RIGSSA to Quiborax on 17 August 2001 could not have happened because the shares could not have been issued prior to 28 August 2001.

²⁴ See Querrela Criminal (Annex CPM-9), p. 6.

²⁵ Respondent's Rejoinder, ¶ 5.

²⁶ See NMM's Shareholders' Registry (Exhibit 11 to Respondent's Objection).

²⁷ See Minutes of NMM's shareholders meeting dated 17 August 2001 (Annex CPM-40).

²⁸ See Exhibit 14 to Respondent's Objection and Exhibit 2 to Respondent's Rejoinder.

²⁹ Bolivia states that RIGSSA contributed its mining concessions on 17 August 2001, but the record shows that such contribution was approved on 3 August 2001. (Respondent's Objection to the RPM, ¶ 25).

³⁰ Bolivia alleges that the public deed is dated 16 August 2001 and thus was issued only one day prior to RIGSSA's transfer to Quiborax (See Respondent's Observations to the RPM ¶ 25). However, the public deed attached as Annex 16 to Respondent's Objection is dated 10 August 2001.

³¹ See Respondent's Objection, ¶ 25. Respondent cites to Annex 16 of its Objection, but this document does not support this allegation.

³² See Exhibit 18 to Respondent's Objection.

- (iii) Bolivia also alleges that, under Bolivian Law, the title that contains transfers of mining concessions must be recorded in the Real Property Register in order to become effective, which Bolivia claims was not done.
 - (iv) Bolivia claims that NMM's Financial Statements filed with the National Revenue Service of Bolivia continued to reflect RIGSSA's shareholder stake in NMM, with an interest of 99.75% of the stock package.³³ Similarly, RIGSSA's Financial Statements at 30 September 2003 show that its shareholder stake in NMM at that date amounted to Bs 2,793,000.³⁴
33. Claimants maintain that what Bolivia claims is forgery is merely the result of a clerical error. Claimants argue that the minutes of 11 September 2001 were incorrectly prepared by one of NMM's lawyers using old models that listed previous shareholders, and when the error was discovered, a new shareholders' meeting was held on 13 September with the correct shareholders. Claimants also insist that the minutes of 11 September were used by mistake to grant powers of attorney for the company.³⁵
34. In this regard, Claimants maintain that in 2004, Claimants' legal counsel at the time of their investment, María del Carmen Ballivián of Estudio Rojas, informed Claimants of an error she had detected in the issuance of powers of attorney upon revision of NMM's corporate administration. According to Ms. Ballivián, the powers of attorney incorporated the 11 September 2001 draft minutes of a shareholders' meeting instead of the definitive 13 September 2001 minutes which are part of the company's book of shareholders' meetings.³⁶
35. Claimants allege that, based on this information, on 21 January 2005 the Board of Directors of NMM acknowledged the mistake and ratified all acts performed by virtue of the powers of attorney that incorporated the 11 September 2001 draft minutes to avoid any challenge of these acts.³⁷ Later that same day, the Board of Directors revoked the powers of attorneys and issued new ones.³⁸
36. In the months following the initiation of the criminal proceedings, Bolivia took several measures related to the criminal investigations, including:

³³ Respondent's Objection, ¶ 24. Respondent does not attach NMM's Financial Statements nor indicates their date.

³⁴ See Exhibit 15 to Respondent's Objection. Bolivia mistakenly states that the shareholder stake was Bs 2,770,000 (Respondent's Objection, ¶ 24).

³⁵ Claimants' Reply, ¶¶ 60-63.

³⁶ Claimants' Reply, ¶ 61. This affirmation is supported by Ms. Ballivián's voluntary testimony. See Minutes of Informative Declaration of Ms. María del Carmen Ballivián Ascarrunz dated 5 February 2009. (Annex CPM-36).

³⁷ Claimants' Reply, ¶ 62. See also Minutes of NMM's Board Meeting dated 21 January 2005. (Annex CPM-59).

³⁸ *Id.*

- (i) The sequestration of corporate records;³⁹ and
 - (ii) The interrogation of persons related to Claimants/NMM's business, including Claimants' former and present legal counsel in Bolivia.⁴⁰
37. On 16 March 2009, formal charges were presented against David Moscoso, Fernando Rojas, Dolly Paredes, Lorena Fernández, and Yury Espinoza.⁴¹
38. The proceedings regarding David Moscoso, Claimants' Bolivian business partner, moved swiftly. At a hearing on preventive measures held on 4 June 2009 before Judge Margot Pérez, Moscoso was ordered to report to the court on a weekly basis, not to leave the country and to present two witnesses as sureties. The *Superintendencia* was not satisfied with this decision and appealed. As a result of this appeal, a bail of US\$300,000 was set on David Moscoso's personal liberty, to be deposited within seventy-two hours.⁴²
39. On 7 August 2009, on notice that bail would be set, David Moscoso wrote to Allan Fosk informing him that, as of the date of the notice he would have 72 hours to pay such bail or risked going to prison. Mr. Moscoso asked Allan Fosk for the bail money in compliance with the "gentlemen's agreements" reached with him and Fosk's father that they would cover all expenses related to the arbitration, and announced that if the money was not forthcoming, he would have to look for ways to preserve his freedom. Mr. Moscoso stated that "[o]ne way could be to ask for summary judgment in my condition as director of the company and be punished with a sanction that would allow me not going to prison...", and added that, if Allan Fosk did not provide him with the bail money, he would immediately start negotiations for the summary judgment.⁴³
40. On 11 August 2009, the *Fiscal* (Prosecutor) presented a request for a summary judgment against David Moscoso sentencing him to two years of imprisonment, stating that this was done at David Moscoso's request.⁴⁴

³⁹ See Deed of Sequestration, 29 January 2009 (Annex CPM-17).

⁴⁰ Jorge Luis Inchauste, current legal counsel of Claimants in Bolivia, was interrogated about documents related to the arbitration and his relationship with Claimants (See Annex CPM-18). Fernando Rojas, former legal counsel and one of the accused persons within the criminal proceedings, was also interrogated (See Annex CPM-35).

⁴¹ See Formal Indictment, 16 March 2009 (Annex CPM-11).

⁴² See Resolution No. 179/2009 of the Third Criminal Chamber, 8 August 2009 (Annex CPM-57).

⁴³ See E-mail from David Moscoso to Allan Fosk, 7 August 2009 (Annex CPM-58). (Original in Spanish).

⁴⁴ See Resolution No. 01/2009, 11 August 2009, Request for Abbreviated Proceeding (Annex CPM-19).

41. The hearing on David Moscoso's summary proceeding took place on 14 August 2009. The decision rendered as a result of that hearing indicated that Mr. Moscoso had confessed his participation in the forgery of the minutes NMM's shareholders' meeting of 13 September 2001.⁴⁵ The decision noted that such forgery had caused a harm to the Bolivian State by allowing Quiborax to initiate an arbitration against Boliva and that the existence of harm was a an essential requirement for the crimes alleged, but that Mr. Moscoso had not known of the harm that his actions could cause.⁴⁶ As a result of Mr. Moscoso's confession, he was sentenced to two years of imprisonment, receiving immediate judicial pardon based on his previous clean record.⁴⁷ Following his judicial pardon, Mr. Moscoso expressly waived his right to appeal.⁴⁸
42. On that same day, David Moscoso signed an affidavit, given expressly "within the request for Arbitration" initiated by Quiborax and others against Bolivia, where he "freely and spontaneously" confessed to his participation in the crimes of *falsedad ideológica* and *uso de instrumento falsificado*.⁴⁹ In that affidavit, he stated that he first learned of the existence of the minutes of 13 September 2001 at NMM's board meeting held on 21 January 2005.⁵⁰ Although he does not expressly say that the minutes were forged, Mr. Moscoso acknowledges that they were used to replace the minutes of 11 September 2001 in order to revoke previous powers of attorney and grant new ones, including powers of attorney related to the ICSID arbitration initiated by Quiborax "with the purpose of having the claim before ICSID prevail against the Bolivian State."⁵¹ This affidavit contradicts Mr. Moscoso's previous declaration before the criminal courts, rendered on 30 January 2009.⁵²
43. While the proceedings against David Moscoso were under way, the Minister of the State's Legal Defense and the Minister of Institutional Transparency and Defense

⁴⁵ The decision does not cite explicitly to the confession, but rather states that "regarding the existence of the act and the participation of the accused in the same, the Prosecutor has proved clearly with all the literal proof that he has presented to this judicial chamber that the accused has participated in the fabrication [*facción*] of these minutes that are accused as false..." and that "the accused... has acknowledged his guilt on the illegal acts that the prosecutor accuses him of..." See Resolution No. 313/2009 dated 14 August 2009, pp. 3-4. (Original in Spanish) (Annex CPM-20).

⁴⁶ See Resolution No. 313/2009 dated 14 August 2009, pp. 2-3 (Annex CPM-20).

⁴⁷ *Id.*, p. 4.

⁴⁸ *Id.*, p. 6.

⁴⁹ See Affidavit of David Moscoso, 14 August 2009 (Annex CPM-21). (Original in Spanish).

⁵⁰ *Id.*

⁵¹ *Id.* (Original in Spanish).

⁵² See Informative Declaration before the Prosecutor as Means of Defense of Mr. David Moscoso Ruiz, Case No. 9394/08, 30 January 2009 (Annex CPM-22).

against Corruption presented criminal charges of *prevaricato* (malfeasance in office) against Judge Margot Pérez for failing in her functions by, among others, refusing to grant Bolivia's initial request for Mr. Moscoso's preventive detention.⁵³ The Minister of the State's Legal Defense justified his standing to file this criminal complaint on the basis of his legal responsibilities to "promote, defend and protect the interests of the plurinational state in jurisdictional proceedings and arbitrations in investment disputes."⁵⁴ Both Ministers accused Judge Pérez of not "taking into consideration the importance of this case that concerns the protection of the goods and interests of the State that are subject of an international arbitration"; "without valuing the procedural risks that continue to exist, and that affect the arbitration that the State of Bolivia confronts before an international tribunal" and by delaying the proceedings "which negatively affects the interests of the Bolivian state, since this causes harm and delay in the international arbitration."⁵⁵

44. On 21 September 2009, the criminal court summoned Fernando Rojas and Dolly Paredes to a hearing on preventive measures.⁵⁶ Claimants feared that their personal liberty and the possible fabrication of evidence were at stake, as they allege had happened in the case of David Moscoso. On 2 October 2009, Claimants filed a request for a "temporary restraining order" to prevent the continuation of criminal proceedings related to this arbitration.⁵⁷ The Tribunal rejected this request, holding that the request did not meet the urgency requirement, and that at that stage it lacked sufficient information to assess whether the requirement of necessity was met or to determine whether any of Claimant's rights required preservation.⁵⁸
45. The hearing on preventive measures that was supposed to take place on 6 October 2009 did not take place. Dolly Paredes submitted a challenge against Judge Margot Pérez for alleged lack of impartiality as a consequence of the criminal proceedings initiated against her by the Minister of the State's Legal Defense.⁵⁹ Judge Pérez accepted the challenge, declaring that her acts "are being controlled within the

⁵³ See Complaint for crimes committed by competent authority, 10 June 2009 (Annex CPM-23), p. 8.

⁵⁴ *Id.*, p. 8 (Original in Spanish).

⁵⁵ *Id.*, pp. 3, 5-6. (Original in Spanish).

⁵⁶ See Annex CRO-1.

⁵⁷ Claimants' Request for a Temporary Restraining Order, 2 October 2009.

⁵⁸ See ICSID letter dated 5 October 2009.

⁵⁹ See Challenge filed by Dolly T. Paredes, 5 October 2009 (Annex CPM-54).

proceedings for *prevaricato*, since any decision of this judge may result in further criminal charges as they have done before...”⁶⁰

III. POSITIONS OF THE PARTIES

A. Claimants' Position

46. Claimants contend that the criminal proceedings are motivated by and aimed at the present arbitration, that they have no self-standing merit, and are instrumental to Bolivia's defense strategy to avoid arbitration on the merits. Specifically, Claimants allege that “[t]he criminal proceedings are merely instrumental to Bolivia's goals in the arbitration, which are to (i) deny the condition of Claimants as foreign investors under the BIT; (ii) obtain, manipulate and fabricate evidence that supports Bolivia's defense strategy, and (iii) ultimately, force Claimants to give up their claims in the arbitration.”⁶¹
47. Claimants also argue that this is a unique case, because Bolivia is prosecuting Claimants and persons related to them for a crime that consists in presenting a claim in an international arbitration.⁶² Claimants support this allegation by asserting that Bolivia has claimed within the criminal proceedings that the harm which is a constituent element of the crimes attributed to the accused persons consists of Bolivia's exposure to this international arbitration.⁶³
48. Finally, Claimants submit that, just as investors must pass certain tests in order to fall under the protection of the ICSID Convention, States too must abide by certain basic notions of behavior and act in accordance with ICSID rules and guiding principles. Claimants argue that “States cannot be allowed to avail themselves of their intrinsically superior powers under their own domestic legal systems in order to obstruct [an] investor's legitimate access to ICSID arbitration”, and that coercing Claimants and persons related to their investment in Bolivia by criminal prosecution is an unacceptable means of boycotting the ICSID system that must not be permitted.⁶⁴

⁶⁰ See Resolution No. 389/2009, Decision on challenge, 7 October 2009 (Annex CPM-55). (Original in Spanish).

⁶¹ Claimants' RPM, ¶ 18.

⁶² Transcript, p. 30, lines 15-20.

⁶³ Transcript, p. 17, lines 2-6; p. 76, lines 18-22; p. 77, lines 1-12.

⁶⁴ Claimants' RPM, ¶ 64.

1. Rights that require preservation

49. Claimants submit that, in accordance with Art. 47 of the ICSID Convention, provisional measures can only be requested to preserve the rights of either party. Claimants allege that the criminal proceedings initiated by Bolivia impair the following rights that need preservation: (1) the right to preservation of the *status quo* and non-aggravation of the dispute; (2) the right to the procedural integrity of the arbitration proceedings; and (3) the right to exclusivity of the ICSID proceedings in accordance with Art. 26 of the ICSID Convention.⁶⁵
50. Claimants reject Bolivia's argument that the Tribunal may only order provisional measures if Bolivia's actions impair the rights "in dispute". Claimants argue that identity between the object of the coercive measures and the rights in dispute is not required, and that in any event Bolivia's actions do affect the rights "in dispute", because Claimants are not only requesting compensation for the unlawful expropriation but also moral damages for the acts of harassment perpetrated by Bolivia against Claimants, in particular by way of criminal proceedings.⁶⁶

a. *Right to the preservation of the status quo and non-aggravation of the dispute*

51. Claimants submit that the right to preservation of the *status quo* and the non-aggravation of the dispute is a self-standing right under international law.⁶⁷ Claimants rely on *Burlington v. Ecuador*,⁶⁸ *Electricity Company of Sofia v. Bulgaria*,⁶⁹ and *Amco Asia v. Indonesia*,⁷⁰ among others.
52. Claimants allege that the criminal proceedings have aggravated, and continue to aggravate, the dispute between the Parties. Claimants assert that Bolivia is doing everything in its power to obstruct the ICSID proceedings, and is using the criminal proceedings and other forms of harassment to ultimately force the Claimants to give up their claims.

⁶⁵ Claimants' RPM, ¶ 34.

⁶⁶ Claimants' Reply, ¶¶ 78-79.

⁶⁷ Claimants' RPM, ¶¶ 36-37.

⁶⁸ *Burlington Resources Inc. and others v. Republic of Ecuador*, ICSID Case No. ARB/08/5, ("*Burlington v. Ecuador*"), Procedural Order No. 1 of 29 June 2009 ¶ 60.

⁶⁹ *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B No. 79, p. 199.

⁷⁰ *Amco Asia Corporation v. Indonesia*, ICSID Case No. ARB/81/1 ("*Amco Asia v. Indonesia*"), Decision on Request for Provisional Measures of 9 December 1983, p. 412.

53. Claimants note as an example that the court issued an order of restraint prohibiting David Moscoso from contacting the other accused, including his former legal counsel Fernando Rojas. Claimants allege that "the direct pressure placed on David Moscoso by the government of Bolivia has made him turn against his own business partners, as well as virtually eradicated him as a source of information and a buttress for the cause of Claimants in the arbitration."⁷¹
54. Claimants allege that Bolivia's course of action has changed the *status quo* of the dispute, as Claimants have become defendants in Bolivia, and has created serious obstacles for Claimants' presentation of their claim. Claimants contend that at the time they submitted their Request for Arbitration, the Parties were equal in arms as to their possibility to present their case, but since December 2008 Claimants' position has been weakened as the persons involved in the criminal proceedings have been forced out from the ICSID proceedings as potential witnesses or sources of information.⁷²
55. Claimants argue that the criminal proceedings are aimed at avoiding discussion on the merits of the dispute and put intolerable pressure on Claimants to drop their claim. As support for this allegation, they cite declarations in the Bolivian press by Bolivian authorities, including Oscar Cámara, former Vice-Minister of the State's Legal Defense and Executive Director of the *Autoridad de Fiscalización y Control Social de Empresas* (the agency that has since replaced the *Superintendencia de Empresas*), claiming the existence of an agreement between the Parties without any payment of compensation by Bolivia to Claimants, allegedly due to Claimants acceptance of the criminal accusations against them.⁷³

b. Right to the procedural integrity of the arbitration proceedings

56. Claimants assert that the criminal proceedings impair their right to the procedural integrity of the arbitration proceedings, in particular with respect to their access to evidence and the integrity of the evidence produced.
57. In particular, Claimants allege that Bolivia is impairing Claimants' access to evidence by sequestering corporate documents and intimidating potential witnesses (including

⁷¹ Claimants' RPM, ¶ 38.

⁷² Claimants' RPM ¶ 39, Claimants' Reply on PM, ¶ 88-90.

⁷³ Claimants' Reply, ¶¶ 91, 33. See Press Article, "Quiborax withdrew arbitration because the Government found alleged fraud" ["Quiborax levantó arbitraje porque el Gobierno halló presunto fraude"], La Razón - Bolivia, 10 September 2009 (Annex CPM-65).

Claimants' former and current legal counsel) who now fear to testify.⁷⁴ Claimants note that the persons involved in the criminal proceedings have been defined by Bolivia as "indispensable witnesses to reach the historic truth of the facts"⁷⁵ but that, fearing for their situation in Bolivia, they are not prepared to participate in this arbitration.⁷⁶ As a result, Claimants claim they have been left without indispensable witnesses for their case.⁷⁷

58. Claimants specifically point to the fact that David Moscoso is now legally impeded to act as a witness for Claimants, as he has made a confession within the criminal proceedings and any testimony to the contrary in the ICSID proceedings would allow Bolivia to prosecute him for false testimony or false self-incrimination (*autocalumnia*).⁷⁸
59. Claimants allege that by forcing confessions such as that of David Moscoso, Bolivia is manipulating and fabricating *ex post facto* evidence to be used in the ICSID proceedings (in particular with respect to the Claimants' standing as investors under the BIT).⁷⁹ Claimants contend that "[i]f the criminal proceedings are allowed to continue, there is every reason to fear that other potential witnesses will find themselves forced to make false statements to save themselves from imprisonment or otherwise face Bolivia's persecution."⁸⁰
60. Claimants also claim that, by questioning Informe 001/2005 and harassing its authors, Bolivia has destroyed information that supports Claimants' status under the BIT. Claimants maintain that "[t]he intricate maneuvers deployed by Bolivia to diminish the value of the report are only within the means of a sovereign State with investigative and coercive powers and not permissible in international arbitration."⁸¹
61. Claimants reject Bolivia's contention that no harm is done because the Tribunal is free to weigh the evidence as it deems appropriate, arguing that this faculty will be contaminated by Bolivia because the persons involved in the criminal proceedings will no longer be able to render candid testimony.⁸²

⁷⁴ Claimants' RPM, ¶¶ 40, 42; Claimants' Reply on PM, ¶¶ 98-102.

⁷⁵ Formal Indictment, p. 10 (Annex CPM-11). (Original in Spanish).

⁷⁶ Claimants' Reply, ¶ 99.

⁷⁷ *Id.*

⁷⁸ Claimants' Reply, ¶ 97.

⁷⁹ Claimants' RPM, ¶ 41; Claimants' Reply, ¶¶ 101-102.

⁸⁰ Claimants' RPM, ¶ 42.

⁸¹ *Id.*

⁸² Claimants' Reply, ¶ 95.

c. The right to the exclusivity of the ICSID proceedings under Art. 26 of the ICSID Convention

62. Claimants contend that the criminal proceedings are aimed at destroying Claimants' status as foreign investors under the Bolivia-Chile BIT and are thus parallel proceedings on jurisdiction prohibited by the exclusivity of ICSID jurisdiction under Art. 26 of the ICSID Convention, which provides in relevant part:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.

63. Claimants submit that "Bolivia is raising and discussing in an alternate forum issues that are aimed at attacking the jurisdiction of the Centre", and that it "has construed the mere existence of being subject to the present arbitration as the object of its domestic criminal prosecution."⁸³ Claimants argue that, as a consequence, the criminal proceedings initiated by Bolivia constitute what Art. 26 of the ICSID Convention calls "other remedy".⁸⁴ Claimants rely on *City Oriente v. Ecuador*, where the Tribunal ordered the Ecuadorian General Prosecutor to refrain from pursuing the criminal investigation of three of City Oriente's executives on charges closely related to the subject of the arbitration.⁸⁵
64. Citing *Tokios Tokelés v. Ukraine*, Claimants submit that parallel proceedings are prohibited under Art. 26 of the ICSID Convention, if they "relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters."⁸⁶ Relying on *CSOB v. Slovak Republic*, Claimants also argue that it is not necessary for the criminal proceedings to deal with the same subject matter as the ICSID proceeding to constitute such "other remedy", and that it is sufficient that the proceedings refer to matters under consideration by the Tribunal.⁸⁷

⁸³ Claimants' RPM, ¶ 50.

⁸⁴ Claimants' RPM, ¶ 51.

⁸⁵ *City Oriente Ltd. v. Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/06/21 ("*City Oriente v. Ecuador*"), Decision on Provisional Measures of 19 November 2007, ¶ 50.

⁸⁶ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 ("*Tokios Tokelés v. Ukraine*"), Order No. 3 of 18 January 2005, ¶ 11.

⁸⁷ *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4 ("*CSOB v. Slovak Republic*"), Procedural Order No. 4 of 11 January 1999, preamble.

2. Requirements for provisional measures

65. Claimants state that provisional measures must be urgent and necessary for the rights invoked to be protected, and that both requirements are fulfilled in the present case.⁸⁸

a. Urgency

66. Citing *Burlington v. Ecuador* and Prof. Schreuer, Claimants submit that “the criterion of urgency is satisfied when [...] ‘a question cannot await the outcome of the award on the merits’”.⁸⁹
67. According to Claimants, what is essential is that the harm is likely to be produced before the date of the award.⁹⁰ For that reason, the urgency requirement must be assessed in the context of the case, as stated by the tribunal in *Biwater Gauff v. Tanzania*:

In the Arbitral Tribunal’s view, the degree of “urgency” which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. [...] The Arbitral Tribunal also considers that the level of urgency required depends on the type of measure which is requested.⁹¹

68. Claimants argue that the requirement of urgency is met in this case.⁹² Specifically, Claimants contend that because the provisional measures are intended to protect against the aggravation of the dispute and to safeguard the jurisdictional powers of the Tribunal and the integrity of the arbitration, they are urgent by definition.⁹³
69. Claimants argue that the urgency of the provisional measures is evidenced by the conviction of David Moscoso,⁹⁴ and that it has become evident that the passage of time in the present case only makes the threat of irreparable harm to Claimants’ rights more imminent.⁹⁵

⁸⁸ Claimants’ RPM, ¶ 35.

⁸⁹ *Burlington v. Ecuador*, Procedural Order No. 1 of 29 June 2009, ¶¶73; Christoph H. Schreuer. *The ICSID Convention: A Commentary* (2001), p. 751, ¶ 14.

⁹⁰ Claimants’ Reply, ¶ 115.

⁹¹ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (“*Biwater Gauff v. Tanzania*”), Procedural Order No. 1 of 31 March 2006, ¶ 76.

⁹² Claimants RPM ¶¶ 52-55.

⁹³ Claimants rely on *Burlington v. Ecuador*, Procedural Order No. 1 of 29 June 2009, ¶ 74 and *City Oriente v. Ecuador*, Decision on Provisional Measures of 19 November 2007, ¶ 69.

⁹⁴ Claimants’ RPM, ¶ 54.

⁹⁵ Claimants’ Reply, ¶ 119.

b. Necessity

70. Claimants submit that “[t]he necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures to the harm Claimants have already suffered and will continue to suffer in consequence of the actions of Bolivia.”⁹⁶
71. According to Claimants, the appropriate standard to assess the necessity of Claimants’ request for provisional measures is that established in Art. 17A of the UNCITRAL Model Law, which requires the party requesting an interim measure to satisfy the tribunal that:

Harm not adequately repaired by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.

72. Following this standard, Claimants argue that the provisional measures requested are necessary because the harm caused would not be adequately repaired by an award on damages. Specifically, Claimants allege that “[t]he harm to Claimants caused by the criminal proceedings, consisting of restrictions on the personal liberty of co-Claimant Allan Fosk and the other persons accused, as well as the corruption of evidence relevant to the present arbitration, is not the kind of harm that can be adequately repaired by an award of damages”, and that “[i]t can only be avoided by immediate termination of the criminal proceedings in Bolivia.”⁹⁷ In contrast, Claimants assert that Bolivia suffers no harm if the criminal proceedings are stayed.⁹⁸

B. Respondent’s Position

73. Respondent notes at the outset that provisional measures are exceptional in nature and should not be granted lightly. Respondent cites *Occidental Petroleum Corporation v. Ecuador*, where the Tribunal held:

It is not contested that provisional measures are extraordinary measures that cannot be recommended lightly. In other words, the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party’s rights and where the need is urgent in order to avoid irreparable harm. The jurisprudence of the International Court of Justice dealing with provisional measures is well-established: a provisional

⁹⁶ Claimants’ RPM, ¶ 53.

⁹⁷ Claimants’ RPM, ¶ 62.

⁹⁸ Claimants’ RPM, ¶ 63.

measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked' [...]⁹⁹

74. In Respondent's view, Claimants' request for provisional measures must fail because it meets none of these requirements.

1. Rights for which protection is sought

75. As a preliminary matter, Respondent contends that provisional measures may not be granted in this case because the criminal proceedings do not affect any of Claimants' rights in the dispute.¹⁰⁰ Specifically, Respondent claims that "[a] criminal proceeding initiated with full factual and legal justification, exclusively to establish the existence of crimes that affect legal rights protected by Bolivian Law, does not constitute a threat to the arbitral proceeding, its development and its results."¹⁰¹
76. Respondent also asserts that Claimants have not established "the existence of even a single objective element from which it could be determined that the rights that are significant to this dispute, including the procedural rights that they invoke, may have been affected or could be affected in an imminent and irreparable manner by the legitimate exercise of the powers that Bolivia can engage in as a sovereign state in order to demand compliance with its legislation and to apply current criminal laws in observation of the principle of due process."¹⁰²
77. In addition, Respondent states that the dispute in this arbitration proceeding would be limited to establishing whether the Claimants have the right to the monetary compensation that they are demanding as a result of the revocation of the mining concessions they claim to have held.¹⁰³ In contrast, the criminal proceedings deal with the prosecution of crimes, specifically the alteration and falsification of documents, the use of a falsified instrument and dereliction of duty by public officers.¹⁰⁴
78. Respondent relies on precedent from the International Court of Justice, in particular the *Case Concerning Certain Criminal Proceedings in France (Republic of Congo v.*

⁹⁹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 ("*Occidental v. Ecuador*"), Decision on Provisional Measures of 17 August 2007, ¶ 59.

¹⁰⁰ Respondent's Objection, ¶¶ 5-7.

¹⁰¹ Respondent's Objection, ¶ 6.

¹⁰² *Id.*

¹⁰³ Respondent's Objection, ¶ 7.

¹⁰⁴ Respondent's Objection, ¶ 8, 30.

France), according to which the power of the Court to indicate provisional measures to maintain the respective rights of the parties is to be exercised only if there is an urgent need to prevent irreparable prejudice to the rights that are the subject of the dispute before the Court has had an opportunity to render its decision.¹⁰⁵

79. Respondent objects to each of Claimants' specific grounds for requesting provisional measures, as described below.

a. With respect to the right to the preservation of the status quo and non-aggravation of the dispute

80. As noted above, Respondent contends that there is no aggravation of the dispute or need to preserve the *status quo*, because the criminal proceedings do not affect the rights in dispute. Respondent argues that the fact that the criminal proceedings cause inconveniences and suffering to Claimants does not prove that they interfere with the rights in dispute.¹⁰⁶
81. In this regard, Respondent submits that there is no self-standing right to the preservation of the *status quo* or the non-aggravation of the dispute. Such right exists only when there is an imminent threat that a right in dispute will suffer irreparable harm.¹⁰⁷
82. Even if such self-standing right existed, as held by the tribunal in *Burlington v. Ecuador*, Respondent argues that the sole existence of this right does not necessarily mandate the adoption of provisional measures. Claimants would have to demonstrate that: (a) the initiation of the criminal proceeding alters the *status quo* of the dispute as it was submitted to the Tribunal; (b) the existence of the criminal proceeding produces a threat of irreparable harm that may affect the disputed rights; and (c) if the requested measures are not adopted, harm would be imminent.¹⁰⁸
83. Respondent argues that Claimants' reliance on *Burlington v. Ecuador* is misguided because the circumstances of that case were totally different from those of the present arbitration. In *Burlington*, Ecuador's actions giving rise to the provisional measures related to the same monetary obligations being examined by the arbitral tribunal, there

¹⁰⁵ *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of June 17, 2003, ICJ Reports 2003, ¶ 22.

¹⁰⁶ Respondent's Objection, ¶ 45.

¹⁰⁷ Respondent's Objection, ¶¶ 11; 46-48.

¹⁰⁸ Respondent's Objection, ¶ 51.

was an ongoing business relationship between the parties that the tribunal deemed worth protecting, and the contract governing that relationship gave rise to an obligation of specific performance that also merited protection. None of those elements is present here.

84. In any event, Respondent claims that there is no change to the *status quo*, because claimant Allan Fosk has not been formally accused and his procedural status has not changed since December 2008. Respondent also notes that none of the persons involved in the criminal proceedings has been called as a witness by Claimants, so their procedural status is not relevant to this arbitration.¹⁰⁹
85. In addition, Respondent claims that there has been no aggravation of the dispute because Claimants have not identified any measure by Bolivia that could exercise a prejudicial effect on the execution of the decision or aggravate or extend the dispute.¹¹⁰
86. Relying on *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*,¹¹¹ Respondent also argues that even when the conduct of one of the parties allegedly aggravates or prolongs the dispute, provisional measures may only be ordered if there is evidence of some irreparable harm to the rights of the other party. As this is not the case here, provisional measures may not be granted.

b. With respect to the right to the integrity of the arbitral proceedings

87. Respondent contends that there is no threat to the integrity of the proceedings, particularly with respect to the production of evidence.
88. Respondent notes that Claimants have already presented substantial evidence, including corporate documentation, both in their Request for Provisional Measures and in their Memorial on the merits. Thus, provisional measures directed to protect Claimants' right to present evidence would serve no purpose.¹¹²
89. If Claimants refer to the evidence that may be presented by Bolivia, Respondent claims that there is no urgency or necessity to support the granting of provisional measures because any evidence that Bolivia presents will be examined, criticized and verified by

¹⁰⁹ Respondent's Objection, ¶¶ 54-61.

¹¹⁰ Respondent's Objection, ¶¶ 64-69.

¹¹¹ *Pulp Mills on the River Uruguay, (Argentina v. Uruguay)*, Order of January 23, 2007, ICJ Reports 2007, ¶ 50.

¹¹² Respondent's Objection, ¶¶ 12, 72.

Claimants and freely evaluated by the Tribunal.¹¹³ Indeed, Respondent argues that any provisional measure intended to prevent such evidence from being presented would be equivalent to ruling on and rejecting such evidence without having examined it, which would affect Bolivia's right to defense.¹¹⁴

90. In this regard, Respondent states that provisional measures directed to prevent the "contamination" of evidence are appropriate only where such evidence is likely to disappear, be destroyed or become unavailable. In these cases, provisional measures are appropriate because they protect the Tribunal's ability to examine evidence in the future. Respondent argues that what Claimants seek is the opposite, that is, the issuance of provisional measures that would prevent particular evidence from ever being submitted to the Tribunal.¹¹⁵
91. Respondent rejects Claimants' accusation that the criminal proceedings were artificially instituted by Bolivia to destroy or distort the evidentiary value of certain documents relevant to proving their condition as investors. This would imply falsely accusing Bolivia of a crime. Respondent asserts that the Bolivian State is governed by the principle of separation of powers and that the Executive branch does not interfere in the administration of justice. Respondent contends that the factual circumstances that motivated the criminal proceedings fully justify such proceedings.¹¹⁶

c. With respect to the exclusivity of the ICSID proceedings

92. Respondent maintains that the exclusivity of the ICSID proceedings may only be threatened by a parallel proceeding, i.e., one that deals with the same matter. Respondent relies on *Tokios Tokelés v. Ukraine*¹¹⁷ and *City Oriente v. Ecuador*¹¹⁸, where the rights subject to the parallel proceedings were the same rights submitted to the consideration of the tribunal in the ICSID proceedings.¹¹⁹
93. Respondent rejects Claimants' argument that the criminal proceedings are directed to denying Claimants' condition as investors protected by the BIT or deciding on the Tribunal's jurisdiction. To the contrary, Respondent argues that the purpose of the

¹¹³ *Id.*

¹¹⁴ Respondent's Objection, ¶ 72.

¹¹⁵ Respondent's Objection, ¶¶ 70, 73.

¹¹⁶ Respondent's Objection, ¶ 12.

¹¹⁷ *Tokios Tokelés v. Ukraine*, Order No. 1, July 1, 2003, ¶ 3.

¹¹⁸ *City Oriente v. Ecuador*, Decision on Provisional Measures of 19 November 2007, ¶¶ 49-54.

¹¹⁹ Respondent's Objection, ¶¶ 74-76.

criminal proceedings is to establish whether the individuals prosecuted committed certain crimes and, if so, to sanction such criminal conduct. Thus, the criminal proceedings do not interfere with the sphere of jurisdiction and competence of the Tribunal.¹²⁰

94. As a result, Respondent contends that the criminal proceedings are not parallel to the ICSID proceedings. While the criminal proceedings seek to sanction crimes that may have been committed, the ICSID arbitration is directed to determining whether the Claimants have the right to the relief they invoke and the compensation they are claiming. Respondent argues that “[t]he circumstance that the documents whose falsification is being investigated are related to the Claimants’ status as shareholders in a Bolivian company does not transform the criminal proceeding into a proceeding that is parallel to the ICSID arbitration, because the results of the criminal proceeding will be the application, or not, of penalties for falsification pursuant to Bolivian law, regardless of the decision of the Arbitral Tribunal regarding the relevance of the claims under the BIT with Chile.”¹²¹
95. In addition, Respondent claims that the proceedings are legitimate *per se*, and not motivated by the ICSID arbitration. Indeed, Respondent argues that by requesting provisional measures Claimants seek to prevent Bolivia from exercising its sovereign right to prosecute crimes within its own territory.¹²² Respondent asserts that the existence of documentation with indications of forgery offers sufficient grounds to merit the initiation of criminal proceedings. In addition, Respondent claims that public officials are required by law to report the commission of a crime.¹²³ The fact that Bolivia paid more attention to NMM’s corporate structure after Claimants filed their Request for Arbitration and thereby discovered irregularities does not mean that the criminal proceedings are a reaction to the ICSID arbitration.¹²⁴

2. Requirements for provisional measures

96. Respondent submits that provisional measures may be granted only in situations in which there exists an urgent need to safeguard rights that are in imminent danger of

¹²⁰ Respondent’s Objection, ¶¶ 76-77.

¹²¹ Respondent’s Rejoinder, ¶ 22.

¹²² Respondent’s Rejoinder, ¶ 6.

¹²³ Respondent’s Rejoinder, ¶ 6. Respondent’s Rejoinder is accompanied by the Expert Report of Dr. Mary Elizabeth Carrasco Condarco, which describes the principles of Bolivian criminal procedure.

¹²⁴ Respondent’s Rejoinder, ¶ 28.

irreparable harm, in such a way that the party could find the party's rights irreparably affected before a decision is made on the merits.¹²⁵ Respondent relies on *Occidental v. Ecuador*,¹²⁶ *Tokios Tokelés v. Ukraine*¹²⁷ and the *Aegean Sea Continental Shelf Case (Greece v. Turkey)*.¹²⁸

97. In this case, Respondent claims that the provisional measures requested are neither urgent nor necessary, because there is no imminent threat of an irreparable harm.

a. Urgency

98. With respect to the urgency requirement, Respondent states that the threat of irreparable harm must be present and imminent. If the threat is not present or the harm is not imminent, there is no need to decide anything before the award or decision is issued. The urgency must be assessed at the time of the request, and should not be a speculation on the future.¹²⁹ Respondent relies on the *Case Concerning Certain Criminal Proceedings in France (Republic of Congo v. France)*.¹³⁰

99. According to Respondent, Claimants' allegations that they will not be able to access key documents or witnesses to present their case on jurisdiction (particularly their fear that key witnesses will be deprived of their liberty) are mere speculations conditional on future events, and thus are incompatible with the notion of urgency.¹³¹

b. Necessity

100. Respondent denies that the measures are necessary to prevent irreparable harm to Claimants' rights. As a preliminary matter, Respondent claims that the requirement of necessity is premised on the existence of a right that requires protection from an irreparable harm. As explained above, Respondent denies that such a right exists in this case.

¹²⁵ Respondent's Objection, ¶ 40.

¹²⁶ *Occidental v. Ecuador*, Decision on provisional measures of 17 August 2007, ¶ 61

¹²⁷ *Tokios Tokelés v. Ukraine*, Order No. 3, January 18, 2005, ¶ 8.

¹²⁸ *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Order of September 11, 1976, ICJ Reports 3, ¶¶ 25, 33.

¹²⁹ Respondent's Rejoinder, ¶ 38.

¹³⁰ *Certain Criminal Proceedings in France (Republic of the Congo v. France, 2003)*, Order of June 17, 2003, ICJ Reports 2003, ¶ 35.

¹³¹ Respondent's Rejoinder, ¶¶ 34-37, 41, 44.

101. In any event, as outlined in the preceding section, Respondent denies that there is any threat of harm to any of the rights invoked by Claimants. Thus, the requirement of necessity is not met.
102. Notwithstanding the above and to support its claims that no provisional measures are necessary, Respondent has committed to:
- (a) Provide certified copies of the corporate documentation sequestered by the Bolivian authorities; and
 - (b) Collaborate so the persons involved in the criminal proceedings can be called as witnesses in the arbitration.
103. With respect to documents, Respondent stated in its Rejoinder that "as a clear sign that it has no intention of putting obstacles in the way of the Claimants' probative task, Bolivia has agreed to obtain from the Prosecutor's Office certified copies of any documents identified by the Claimants, if they should have any difficulty in doing so."¹³² During the telephone conference that took place on 24 November 2009, Respondent stated that more than a commitment, this was an expression of Claimants' unrestricted right to access to documents under Bolivian law.¹³³ This said, after being specifically asked by the President of the Tribunal, Respondent confirmed the commitment undertaken in the Rejoinder with respect to access to documents.¹³⁴
104. With respect to access to witnesses, Respondent stated in its Rejoinder that the persons involved in the criminal proceedings "could be witnesses if they wanted. In fact, since Respondent would certainly be interested in questioning them to see if it would finally be possible to clarify the famous issue of the 'formal errors', it would cooperate as necessary so that they could offer their testimony to the Tribunal."¹³⁵ This commitment was confirmed by Respondent during the telephone conference.¹³⁶

¹³² Respondent's Rejoinder, ¶ 33.

¹³³ Transcript, p. 81, lines 16-22; p. 82, lines 1-11.

¹³⁴ Transcript, p. 86, lines 10-22; p. 87, lines 1-14; p. 92, lines 12-22.

¹³⁵ Respondent's Rejoinder, ¶ 35.

¹³⁶ Transcript, p. 89, lines 13-16; p. 90, lines 2-22; p. 91, line 1, 18-22.

IV. DISCUSSION

A. Applicable Standards

1. Legal framework

105. The relevant rules are found in Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, which are generally considered to grant wide discretion to the Arbitral Tribunal on the issue of provisional measures.

106. Article 47 of the ICSID Convention provides that:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

107. Rule 39 of the ICSID Arbitration Rules (effective as of January 1, 2003) provides in relevant parts:

- (1) At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

[...]

2. *Prima facie* jurisdiction

108. It is undisputed by the Parties that the Arbitral Tribunal has the power to order provisional measures prior to ruling on its jurisdiction. The Tribunal will not exercise such power, however, unless there is a *prima facie* basis for jurisdiction.

109. The Tribunal is satisfied that it has *prima facie* jurisdiction for the purposes of rendering this decision. The Request for Provisional Measures was filed by Claimants in this arbitration. Claimants claim to be Chilean nationals, and Chile is a signatory to the

ICSID Convention. At the date when Claimants' Request for Arbitration was filed, as well as at the date when the Request for Arbitration was registered by the ICSID Secretariat, Bolivia was still a signatory to the ICSID Convention. Thus, the Tribunal has *prima facie* jurisdiction *ratione personae*.

110. Claimants claim that the disputes brought before this Tribunal arise from breaches by Bolivia of its obligations with respect to Claimants' investments in Bolivia under the Chile-Bolivia BIT. To this date, Bolivia has not contested this allegation. Thus, the Tribunal has *prima facie* jurisdiction *ratione materiae*.
111. Further, Claimants allege that the dispute arose in June 2004, long after the entry into force of the BIT in 1999. Bolivia has not contested this allegation. The Tribunal therefore also has *prima facie* jurisdiction *ratione temporis*.
112. Finally, by ratifying the Chile-Bolivia BIT, Bolivia consented in writing to the jurisdiction of the Centre over disputes such as those brought by Claimants. Claimants consented in writing to the jurisdiction of the Centre by filing their Request for Arbitration. Consequently, the Tribunal has *prima facie* jurisdiction *ratione voluntatis*, on the basis of the Parties' consent.

3. Requirements for provisional measures

113. There is no disagreement between the Parties, and rightly so, that provisional measures can only be granted under the relevant rules and standards, if rights to be protected do exist (Section B below), and the measures are urgent (Section C below) and necessary (Section D below), this last requirement implying an assessment of the risk of harm to be avoided by the measures. By contrast, the Parties disagree on the type and existence of the rights to be protected. The Parties further disagree on whether the measures are urgent and/or necessary. The Tribunal will now review the different requirements for provisional measures set out and the Parties' divergent positions in this respect.

B. Existence of Rights Requiring Preservation

114. Claimants allege that the following three rights need preservation by way of provisional measures: (i) the right to preservation of the *status quo* and non-aggravation of the dispute; (ii) the right to the procedural integrity of the arbitration proceedings, and (iii) the right to exclusivity of the ICSID proceedings in accordance with Art. 26 of the ICSID Convention.

115. As a preliminary matter, the Tribunal will deal first with Bolivia's contention that the rights that may be protected by provisional measures may only be the rights "in dispute", and specifically whether under the circumstances of this case the rights invoked by Claimants may be preserved by provisional measures (Section 1 below). The Tribunal will then review the right to exclusivity of the ICSID proceedings (Section 2 below); then the right to preservation of the *status quo* and non-aggravation of the dispute (Section 3 below); and finally the right to the procedural integrity of the arbitration proceedings (Section 4 below).

1. Rights that may be protected by provisional measures

116. Bolivia contends that provisional measures may not be granted in this case because the criminal proceedings do not affect any of Claimants' rights "in dispute", understood as the rights that are the subject matter of the ICSID arbitration. In contrast, Claimants argue that identity between the object of the coercive measures from which protection is sought and the rights in dispute is not required.

117. The Tribunal agrees with Claimants' position. In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the *status quo* and to the non-aggravation of the dispute. As stated by the Tribunal in *Burlington v. Ecuador*, these latter rights are self-standing rights.¹³⁷ The Tribunal in *Biwater Gauff v. Tanzania* reached a similar conclusion.¹³⁸

118. In the Tribunal's view, the applicable criterion is that the right to be preserved bears a relation with the dispute. This was the standard adopted by the tribunal in *Plama v. Bulgaria*:

The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be

¹³⁷ *Burlington v. Ecuador*, ¶ 60.

¹³⁸ See *Biwater Gauff v. Tanzania*, Procedural Order No. 1, 31 March 2006, ¶ 71 ("The type of rights capable of protection by means of provisional measures are not only substantive rights but also procedural rights").

related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date.¹³⁹

119. It is evident from the record that the criminal proceedings are related to, and may even be motivated by, the ICSID arbitration. Most of the documents in the criminal proceedings refer expressly to the ICSID arbitration. To cite one example, when David Moscoso made his alleged confession, such confession specifically stated to be issued "within the Request for Arbitration initiated by [Quiborax]."¹⁴⁰
120. Although the subject matter of the criminal proceedings is the prosecution of crimes of forgery, use of forged documents, fraud, destruction of personal property to defraud and dereliction of duties, the factual accusation underlying these proceedings is that the minutes of 13 September 2001 of NMM were forged to support Claimants' contention that they were shareholders of NMM at the time the dispute brought before this Tribunal arose, thus allowing them to gain access to ICSID arbitration under the Chile-Bolivia BIT.¹⁴¹ This access to ICSID arbitration is expressly deemed to constitute the harm caused to Bolivia that is required as one of the constituent elements of the crimes prosecuted.¹⁴² Thus, the criminal proceedings are related to this arbitration because both the conduct alleged and the harm allegedly caused relate closely to Claimants' standing as investors in the ICSID proceeding.
121. In addition, although the Tribunal has every respect for Bolivia's sovereign right to prosecute crimes committed within its territory, the evidence in the record suggests that the criminal proceedings were initiated as a result of a corporate audit that targeted Claimants *because* they had initiated this arbitration. Indeed, the *Querella Criminal* expressly states that the alleged irregularities in Claimants' corporate documentation were detected in consideration of ("en atención a") the Request for Arbitration filed by Claimants against Bolivia.¹⁴³ Lorena Fernández, one of the authors of Informe

¹³⁹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 ("Plama v. Bulgaria"), Order, 6 September 2005, ¶ 40.

¹⁴⁰ Affidavit of David Moscoso (Annex CPM-21). (Original in Spanish).

¹⁴¹ See, e.g. Request for Abbreviated Proceeding (Annex CPM-19), p. 5 ("For the above reasons [and] the existing evidence Mr. David Moscoso recognizes freely and spontaneously the falsity introduced in the minutes of 13 September of 2001, whose only objective was to make the Chilean company QUIBORAX a participant in the incorporation of the company N.M.M. and to use this to benefit from the Bolivia-Chile bilateral treaty and in this way sue the Bolivian State and cause a harm to it.") (Original in Spanish).

¹⁴² See *Querella Criminal* (Annex CPM-9) pp. 1209-1210; Formal Indictment (Annex CPM-11), pp. 4-5; Request for Abbreviated Proceeding (Annex CPM-19), p. 5; Resolution No. 313/2009 (Annex CPM-20), p. 3; Complaint for crimes committed by competent authority (Annex CPM-23), p. 2.

¹⁴³ See *Querella Criminal* (Annex CPM-9), p. 1209 ("In consideration of the request for arbitration filed by the company Química e Industrial del Bórax Ltda., Non Metallic Minerals S.A. and Mr. Allan Isaac Fosk Kaplún, against the Bolivian State, a series of irregularities had been detected because certain documentation appeared

001/2005, testified that the corporate audit was made at the request of the Ministry of Foreign Affairs in the context of an arbitration proceeding and was aimed at establishing whether the shareholders in NMM were Chilean nationals.¹⁴⁴ Indeed, the very content of Informe 001/2005 suggests that the underlying motivation for the audit was to serve Bolivia in the defense of this arbitration claim, as it contained specific recommendations for such defense.¹⁴⁵

122. The Tribunal cannot fail to note that these actions were taken after an inter-ministerial committee specifically recommended in the 2004 Memo that Bolivia should try to find flaws in Claimants' mining concessions as a defense strategy for the ICSID arbitration.¹⁴⁶ Seen jointly with the 2004 Memo, the corporate audit and the criminal proceedings appear to be part of a defense strategy adopted by Bolivia with respect to the ICSID arbitration.
123. Whether such defense strategy amounts to harassment, as Claimants allege, is not clear to the Tribunal. Bolivia has the sovereign power to prosecute conduct that may constitute a crime on its own territory, if it has sufficient elements justifying prosecution. ~~Bolivia also has the power to investigate whether Claimants have made their investments in Bolivia in accordance with Bolivian law and to present evidence in that respect.~~ But such powers must be exercised in good faith and respecting Claimants' rights, including their *prima facie* right to pursue this arbitration.
124. What is clear to the Tribunal is that there is a direct relationship between the criminal proceedings and this ICSID arbitration that may merit the preservation of Claimants' rights in the ICSID proceeding. The Tribunal will now examine specifically whether any or all of the three rights invoked by the Claimant merit such protection in the specific circumstances of the case.

to have been fabricated in order to mislead the *Superintendencia de Empresas*, during audits carried out to such company due to the incomplete documentation that was presented to the auditing entity, so that it would certify that the company Non Metallic Minerals had foreign capital so that it could benefit from the Bilateral Investment Treaty signed with the Republic of Chile and thus not [have to] go before Bolivian courts." (Original in Spanish)

¹⁴⁴ See Declaration of Lorena Fernández (Annex CPM-37), pp. 2, 4.

¹⁴⁵ See Informe 001/2005 (Annex CPM-14), pp. 6-7.

¹⁴⁶ See 2004 Memo (Annex CPM-5).

2. Right to exclusivity of the ICSID proceedings in accordance with Art. 26 of the ICSID Convention

125. Claimants argue that provisional measures are necessary to preserve the exclusivity of the ICSID proceedings under Article 26 of the ICSID Convention, which provides in relevant part:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.

126. Claimants argue that the criminal proceedings are aimed at destroying their status as foreign investors under the Bolivia-Chile BIT and thus constitute “other remedy” for purposes of Art. 26 of the ICSID Convention. Bolivia rejects this argument by pointing out that the subject matter of the ICSID proceeding (determining whether Bolivia has breached its obligations under the BIT and Claimants are entitled to the relief sought) is distinct from the subject matter of the criminal proceedings (prosecuting and punishing crimes in accordance with Bolivian law).

127. The Tribunal has no doubt that the right to exclusivity of the ICSID proceedings is susceptible of protection by way of provisional measures. In the words of the *Tokios Tokelés v. Ukraine* tribunal:

Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative.¹⁴⁷

128. The question that arises is whether the continuation of the criminal proceedings referred to in this decision threatens the exclusivity of the ICSID proceedings. The Tribunal considers that it does not. Although it finds that the criminal proceedings are related to the ICSID arbitration, that does not *per se* threaten the exclusivity of the arbitration proceedings under Article 26 of the ICSID Convention. Pursuant to Article 25 of the ICSID Convention, the Centre has jurisdiction to resolve investment disputes. Thus, the exclusivity of the ICSID proceedings applies only to investment disputes, i.e. here to the determination of whether Respondent has breached its international obligations under the BIT and whether Claimants are entitled to the relief they seek.

¹⁴⁷ *Tokios Tokelés v. Ukraine*, Order No. 3 of 18 January 2005, ¶ 7, citation omitted.

129. Consequently, the exclusivity of the ICSID proceedings does not extend to criminal proceedings. Criminal proceedings deal with criminal liability and not with investment disputes, and fall by definition outside the scope of the Centre's jurisdiction and the competence of this Tribunal. Neither the ICSID Convention nor the BIT contain any rule enjoining a State from exercising criminal jurisdiction, nor do they exempt suspected criminals from prosecution by virtue of their being investors.
130. Thus, the Tribunal finds that the criminal proceedings initiated by Respondent do not threaten the exclusivity of the ICSID proceedings. Even if the criminal proceedings result in evidence that is later used by Respondent in this arbitration, that would not undermine the Tribunal's jurisdiction to resolve Claimants' claims, if such jurisdiction is established at the appropriate procedural instance.
131. In this respect, the Tribunal notes that the practice of ICSID tribunals has been to consider that other proceedings are parallel for purposes of Art. 26 of the ICSID Convention when such proceedings deal with the same subject matter as the ICSID dispute. This was the criterion adopted by the tribunal in *Perenco v. Ecuador*¹⁴⁸, for instance.

3. The right to the preservation of the *status quo* and the non-aggravation of the dispute

132. Claimants allege that the criminal proceedings are aggravating the dispute because they put intolerable pressure on them to abandon their claim and are thus aimed at avoiding the resolution of the dispute. Claimants also allege that the criminal proceedings have changed the *status quo* of the dispute, as they have become defendants in Bolivia, and have created serious obstacles for Claimants' presentation of their claim. Respondent opposes that there is no self-standing right to the preservation of the *status quo* or the non-aggravation of the dispute and that, in any event, there is no aggravation of the dispute or need to preserve the *status quo*, because the criminal proceedings do not affect the rights in dispute.
133. As noted above, the Tribunal considers that although the criminal proceedings do not deal with the same subject matter as the ICSID proceeding, they are sufficiently related to merit the protection of Claimants' rights to the non-aggravation of the dispute and the preservation of the *status quo*, which the Tribunal considers to be self-standing rights.

¹⁴⁸ *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6) ("*Perenco v. Ecuador*"), Decision on Provisional Measures, 8 May 2009, ¶ 61.

134. The existence of the right to the preservation of the *status quo* and the non-aggravation of the dispute is well-established at least since the case of the *Electricity Company of Sofia and Bulgaria*.¹⁴⁹ In the same vein, the *travaux préparatoires* of the ICSID Convention referred to the need “to preserve the *status quo* between the parties pending [the] final decision on the merits” and the commentary to the 1968 edition of the ICSID Arbitration Rules explained that Article 47 of the Convention “is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award.”¹⁵⁰
135. In ICSID jurisprudence, this principle was first affirmed in *Holiday Inns v. Morocco*¹⁵¹ and then reiterated in *Amco v. Indonesia*. In the latter case, the tribunal acknowledged “the good and fair practical rule, according to which both Parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult”¹⁵².
136. The principle was re-affirmed in *Plama v. Bulgaria*¹⁵³ (although with a somewhat more limited approach), *Occidental v. Ecuador*¹⁵⁴, *City Oriente v. Ecuador*¹⁵⁵, and *Burlington v. Ecuador*.¹⁵⁶
137. Having established the existence of these rights, the question that arises is whether the criminal proceedings are in fact aggravating the ICSID dispute or have changed the *status quo*.
138. The Tribunal agrees with Claimants that the criminal proceedings exacerbate the climate of hostility in which the dispute is unfolding. However, it also notes that Claimants have no more activities or presence in Bolivia. Their mining concessions have been revoked, so there is no ongoing investment to protect. Co-Claimant Allan Fosk – the only Claimant implicated in the criminal proceedings – has not been formally

¹⁴⁹ *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B, No 79, p.199. See also the *LaGrand case (Germany v. United States)*, Judgment of 27 June 2001, ¶ 103, ICJ Reports 2001, p. 466.

¹⁵⁰ 1 ICSID Reports, p. 99.

¹⁵¹ *Holiday Inns S.A. and others v. Kingdom of Morocco* (ICSID Case No. ARB/72/1), Order of 2 July 1972, not public but commented in Pierre Lalive, “The First ‘World Bank’ Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems”, BYIL, 1980.

¹⁵² *Amco Asia v. Indonesia*, Decision on request for provisional measures of 9 December 1983, ICSID Reports, 1993, p. 412.

¹⁵³ *Plama v. Bulgaria*, Order of 6 September 2005, ¶ 40.

¹⁵⁴ *Occidental v. Ecuador*, Decision on provisional measures of 17 August 2007, ¶ 96.

¹⁵⁵ *City Oriente v. Ecuador*, Decision on provisional measures of 19 November 2007, ¶ 55.

¹⁵⁶ *Burlington v. Ecuador*, Procedural Order No. 1 of 29 June 2009, ¶¶ 61-68.

accused and does not live in Bolivia. Thus, the Tribunal cannot agree with Claimants that the criminal proceedings place “intolerable pressure” on Claimants to drop their claims. Likewise, the Tribunal cannot concur with Claimants’ argument that the criminal proceedings have changed the *status quo* of the dispute because they have turned them into defendants in Bolivia. If there are legitimate grounds for the criminal proceedings, Claimants must bear the burden of their conduct in Bolivia.

4. Right to the procedural integrity of the arbitration proceedings

139. Claimants assert that the criminal proceedings impair their right to the procedural integrity of the arbitration proceedings, in particular with respect to their access to evidence and the integrity of the evidence. Specifically, Claimants claim that through the criminal proceedings Respondent has obstructed their access to indispensable evidence by sequestering their corporate records and alienating potential witnesses; that Respondent has fabricated *ex post facto* evidence by forcing false confessions out of a potential witness and thus making him unavailable to testify, and seeks to do the same with other potential witnesses; and that Respondent attempts to destroy the probative value of certain documents, such as Informe 001/2005.
140. Respondent denies that the criminal proceedings pose a threat to the procedural integrity of the arbitration proceedings, in particular with respect to the production of evidence. If Claimants’ allegation refers to the evidence to be presented by Claimants, Respondent submits that Claimants have already presented substantial evidence, and that Respondent is in no way restricting its access to documentary evidence or potential witnesses. To the contrary, Respondent submits that granting provisional measures would deprive it of the possibility to present its own case, because the criminal proceedings may result in evidence that could be submitted to this Tribunal. Respondent also rejects Claimants’ accusation that the criminal proceedings were artificially instituted by Bolivia to destroy or distort the evidentiary value of certain documents relevant to proving their condition as investors.
141. The Tribunal has no doubt that it has the power to grant provisional measures to preserve the procedural integrity of the ICSID proceedings, in particular the access to and integrity of the evidence. Such measures were granted in *Biwater Gauff v. Tanzania*¹⁵⁷ and *Agip v. Congo*¹⁵⁸ with respect to documentary evidence.

¹⁵⁷ *Biwater Gauff v. Tanzania*, ¶¶ 84- 98.

142. The Tribunal considers that the criminal proceedings may indeed be impairing Claimants' right to present their case, in particular with respect to their access to documentary evidence and witnesses. Claimants have been deprived of their corporate records and, although it appears from the record that Claimants have had access to copies of certain documents, it is unclear whether they are still missing relevant documentation that might assist them in presenting their case on jurisdiction or the merits.
143. The Tribunal is also troubled by the effect that the criminal proceedings may have on potential witnesses. The record shows that Respondent has pressed formal charges against several persons involved in Claimants' operation in Bolivia, including its business partner, former counsel, the authors of Informe 001/2005, and the judge who refused to order the preventive detention of Mr. Moscoso. It is true that Claimants have already produced evidence with their Memorial and that these persons have not been named as witnesses. However, Claimants have not answered any possible objections to jurisdiction yet nor submitted their Reply to Respondent's Counter-Memorial on the merits, if any. If such objections are raised, then the record as it stands seems to indicate that these persons may indeed be privy to relevant facts and be asked to give evidence.
144. Respondent denies that it has exercised any undue pressure on these persons that could prevent them from acting as witnesses in this arbitration. However, at least one of them – David Moscoso – is as a result of the criminal proceedings legally prevented from testifying for Claimants in the ICSID proceedings because he cannot testify against his own confession.
145. In addition, the way in which the criminal proceedings against David Moscoso developed suggests that Respondent indeed may be exercising undue pressure against potential witnesses. The record shows that David Moscoso had first denied participation in the crimes charged and confessed only after bail of US\$300,000 was set on his personal liberty. Such bail had first been denied by the competent judge, and was only set after that judge was charged with malfeasance in office for having neglected to consider the importance of the case for the State of Bolivia. The Tribunal also finds it troubling that although the Bolivian authorities first insisted on Mr.

¹⁵⁸ *Agip SpA v. People's Republic of Congo*, ICSID Case No. ARB/77/1, Decision, 18 January 1979, reported in the Award of 30 November 1979, 1 ICSID Reports, p. 310.

Moscoso's preventive detention, once he had confessed he was immediately pardoned, which seems to suggest that the restriction on his personal liberty was meant as an intimidation measure and not because the nature or circumstances of the crime required Mr. Moscoso's detention.

146. Even if no undue pressure is exercised on potential witnesses, the very nature of these criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding. Given that the existence of this ICSID arbitration has been characterized within the criminal proceedings as a harm to Bolivia, it is unlikely that the persons charged will feel free to participate as witnesses in this arbitration.
147. The Tribunal is not persuaded by Respondent's argument that if provisional measures are granted this would affect Respondent's ability to present its case in this ICSID arbitration. Somewhat paradoxically, Respondent itself has argued that the criminal proceedings are not directed to determine the jurisdiction of this Tribunal. In any event, whether Claimants made an investment in Bolivia that is covered by the Chile-Bolivia BIT will not be proved or disproved by criminal proceedings, but by evidence related to ownership and to the manner in which the investment was made, among others. Even if the criminal proceedings could potentially result in evidence of facts related to this Tribunal's jurisdiction, the Tribunal would not be bound by it.
148. Thus, the Tribunal finds that Claimants have shown the existence of a threat to the procedural integrity of the ICSID proceedings, in particular with respect to their right to access to evidence through potential witnesses. In the words of the *Plama* tribunal, the Tribunal finds that, under the particular circumstances of this case, the rights invoked by Claimants and analyzed in this Section relate to Claimants' "ability to have [their] claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal".¹⁵⁹

C. Urgency

149. The Parties agree that there is urgency when there is a need to safeguard rights that are in imminent danger of irreparable harm before a decision is made on the merits. They disagree, however, on whether the present facts meet the urgency requirement.

¹⁵⁹ *Plama v. Bulgaria*, Order, 6 September 2005, ¶ 40.

150. The Arbitral Tribunal agrees with Claimants that the criterion of urgency is satisfied when "a question cannot await the outcome of the award on the merits"¹⁶⁰. This is in line with the practice of the International Court of Justice ("ICJ")¹⁶¹. The same definition has also been given in *Biwater Gauff v. Tanzania*:

In the Arbitral Tribunal's view, the degree of 'urgency' which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award.¹⁶²

151. Claimants argue that the requirement of urgency is met in this case. Specifically, Claimants contend that because the measures are intended to protect against the aggravation of the dispute and to safeguard the jurisdictional powers of the Tribunal and the integrity of the arbitration, they are urgent by definition.
152. By contrast, Respondent argues that there is no imminent threat to any of Claimants' rights because the alleged harm to such rights is mere speculation.
153. The Tribunal agrees with Claimants that if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition. Indeed, the question of whether a Party has the opportunity to present its case or rely on the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits.

D. Necessity

154. The Tribunal has found that the criminal proceedings threaten the procedural integrity of the ICSID proceeding, and that provisional measures are urgent. The Tribunal will now examine if provisional measures such as those requested by Claimants are necessary.

¹⁶⁰ Christoph Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, p. 751, ¶ 14.

¹⁶¹ In the words of the ICJ, "[w]hereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 17, ¶ 23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, ICJ Reports 2003, p. 107, ¶ 22; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Preliminary Objections, Order of 23 January 2007, p. 11, ¶ 32), and whereas the Court thus has to consider whether in the current proceedings such urgency exists", *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order of 15 October 2008, ¶ 129.

¹⁶² *Biwater Gauff v. Tanzania*, Procedural Order No. 1 of 31 March 2006, ¶ 76.

155. The Parties agree that provisional measures must be necessary, in other words, that they must be required to avoid harm or prejudice being inflicted upon the applicant. However, they disagree on the qualification of the harm, whether serious or irreparable, and also whether the criminal proceedings present a harm to Claimants' rights that requires avoidance by granting provisional measures.

156. The Tribunal considers that an irreparable harm is a harm that cannot be repaired by an award of damages. Such a standard has been adopted by several ICSID tribunals and embodied in Art. 17A of the UNCITRAL Model Law.¹⁶³ That provision requires the party requesting an interim measure to satisfy the tribunal that:

Harm not adequately repaired by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.

157. Following this standard, Claimants submit that the provisional measures requested are necessary because the harm caused would not be adequately repaired by an award of damages. The Tribunal agrees with Claimants in this respect: any harm caused to the integrity of the ICSID proceedings, particularly with respect to a party's access to evidence or the integrity of the evidence produced could not be remedied by an award of damages.

158. However, Claimants have accurately pointed out that the necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures. The Tribunal must thus balance the harm caused to Claimants by the criminal proceedings and the harm that would be caused to Respondent if the proceedings were stayed or terminated.

159. Respondent claims that its sovereignty would be harmed if the Tribunal orders the provisional measures sought by Claimants, as this would unduly interfere with its right to prosecute crimes committed on its territory. Respondent also argues that the criminal proceedings may provide evidence that it could present in the ICSID proceedings, and that granting the measures requested by Claimants would prevent such evidence from ever reaching the Tribunal and would thus affect its right to present its case.

¹⁶³ See *City Oriente v. Ecuador*, Decision on Revocation of Provisional Measures, 13 May 2008, ¶ 72, n. 21; *Sergei Paushok v. Republic of Mongolia*, Order on Interim Measures of 2 September 2008 ¶¶ 68-69; *Burlington v. Ecuador*, Procedural Order No. 1 of 29 June 2009, ¶¶ 81-82.

160. In addition, Respondent has committed to collaborate with Claimants' access to documentary evidence and witnesses. Specifically, it has committed to:
- (a) "obtain from the Prosecutor's Office certified copies of any documents identified by the Claimants, if they should have any difficulty in doing so",¹⁶⁴
 - (b) "cooperate as necessary so that [the persons charged in the criminal proceedings] could offer their testimony to the Tribunal".¹⁶⁵
161. In Claimants' view, these commitments are not sufficient. Claimants insist that they require the entire set of original documents sequestered by Bolivia, and that they have serious difficulties accessing documents from the criminal proceedings, so Respondent's assurance that the criminal documents are available to them is an empty promise.¹⁶⁶
162. With respect to witnesses, Claimants contend that Respondent's assurances are insufficient because it is not in Respondent's power to grant them access to the witnesses. Claimants assert that the persons involved in the criminal proceedings cannot or are not willing to appear as witnesses in this arbitration, either because they are legally impeded from rendering testimony contrary to their prior testimony in the criminal proceedings (as is the case of David Moscoso), or because they fear that their participation in the arbitration will worsen their status in the criminal proceedings. Thus, Claimants argue that the only way to make these persons available would be to stop the criminal proceedings so that these persons can testify freely and without fear.¹⁶⁷
163. The Tribunal takes due notice of Respondent's commitments set out in paragraph 160 above. Nonetheless, the Tribunal agrees with Claimants that in the particular circumstances of this case the commitment with respect to witnesses is insufficient. Regardless of whether the criminal proceedings have a legitimate basis or not (an issue which the Tribunal is not in a position to determine), the direct relationship between the criminal proceedings and this ICSID arbitration is preventing Claimants from accessing witnesses that could be essential to their case. No assurance of cooperation from Respondent can guarantee that persons who are being prosecuted for having allegedly caused harm to Respondent by permitting Claimants to present

¹⁶⁴ Respondent's Rejoinder ¶ 33; *see also* Transcript, p. 81, lines 16-22; p. 82, lines 1-11.

¹⁶⁵ Respondent's Rejoinder ¶ 35; *see also* Transcript, p. 86, lines 10-22; p. 87, lines 1-14; p. 92, lines 12-22.

¹⁶⁶ Transcript, p. 86-88.

¹⁶⁷ Transcript, p. 93-95.

this arbitration will be willing to participate as witnesses in this very same arbitration. Under these circumstances, the Tribunal considers that Claimants' access to witnesses may improve if the criminal proceedings are stayed until this arbitration is finalized or this decision is reconsidered.

164. The Tribunal has given serious consideration to Respondent's argument that an order granting the provisional measures requested by Claimants would affect its sovereignty. In this respect, the Tribunal insists that it does not question the sovereign right of a State to conduct criminal cases. As mentioned in paragraph 129 above, the international protection granted to investors does not exempt suspected criminals from prosecution by virtue of their being investors. However, the situation encountered in this case is exceptional. The Tribunal has been convinced that there is a very close link between the initiation of this arbitration and the launching of the criminal cases in Bolivia. It has become clear to the Tribunal that one of the Claimants is being subjected to criminal proceedings precisely because he presented himself as an investor with a claim against Bolivia under the ICSID/BIT mechanism. Likewise, the Tribunal has been convinced that the other persons named in the criminal proceedings are being prosecuted because of their connection with this arbitration (be it as Claimants' business partners or counsel, or as authors of a report ordered by a state agency). Although Bolivia may have reasons to suspect that the persons being prosecuted could have engaged in criminal conduct, the facts presented to the Tribunal suggest that the underlying motivation to initiate the criminal proceedings was their connection to this arbitration, which has been expressly deemed to constitute the harm caused to Bolivia that is required as one of the constituent elements of the crimes prosecuted.

165. In addition, the Tribunal is of the opinion that a mere stay of the criminal proceedings would not affect Respondent's sovereignty nor require conduct in violation of national law. Respondent's expert in criminal procedure, Dr. Mary Elizabeth Carrasco Condarco, notes that the prosecutor may request the competent judge to refrain from prosecuting a criminal action in certain cases, such as when the event is of little social relevance or judicial pardon is foreseeable.¹⁶⁸ The fact that David Moscoso was

¹⁶⁸ Dr. Carrasco Condarco states: "The exercise of the public criminal action may not be suspended, interrupted, nor ceased, except in the cases expressly provided by law. The prosecutor's office shall have the obligation to exercise the public criminal action in all the cases where it applies, however, it may request the Judge that exercises jurisdictional control to dispense with criminal persecution of one or more of the events prosecuted, with respect to one or more participants, only in the following cases: 1.- When it is an event of little social relevance due to its minimal effect on the legally protected interest, 2.- When the prosecuted person has suffered as a

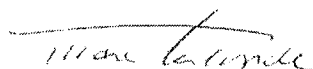
immediately pardoned, allegedly on the basis of a clean record, suggests that others in a similar situation may be pardoned as well, and that Respondent does not consider them a threat to society. In any event, the harm that such a stay would cause to Bolivia is proportionately less than the harm caused to Claimants if the criminal proceedings were to continue their course. Once this arbitration is finalized, Respondent will be free to continue the criminal proceedings, subject to the Tribunal terminating or amending this Decision prior to the completion of this arbitration.

V. DECISION

[166] On this basis, the Arbitral Tribunal makes the following decision:

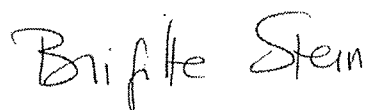
1. Respondent shall take all appropriate measures to suspend the criminal proceedings identified as Case N° 9394/08, initiated against Allan Fosk, David Moscoso, Fernando Rojas, María del Carmen Ballivián, Daniel Gottschalk, Dolly Teresa Paredes de Linares, Gilka Salas Orozco, María Mónica Lorena Fernández Salinas, Yury Alegorio Espinoza Zalles, Tatiana Giovanna Terán de Velasco and Ernesto Ossio Aramayo, and any other criminal proceedings directly related to the present arbitration, until this arbitration is completed or until reconsideration of this decision, whether at the request of a Party or of the Tribunal's own motion.
2. Respondent shall also refrain from initiating any other criminal proceedings directly related to the present arbitration, or engaging in any other course of action which may jeopardize the procedural integrity of this arbitration.
3. Claimants' other requests for provisional measures are denied.
4. Costs are reserved for a later decision or award.

consequence of the event a physical or moral damage more serious than the sentence to be imposed; 3.- When the sentence that is expected for the crime which prosecution is dispensed with lacks importance in consideration of a sentence that has already been imposed for another crime, 4.- When judicial pardon is foreseeable and 5.- When the expected sentence lacks importance considering those of other crimes, or that which would be imposed in a proceeding taking place abroad and the requested extradition may be granted (article 21 of the [Code of Criminal Procedure])." Expert Report of Mary Elizabeth Carrasco Condarco, p. 3. (Original in Spanish).



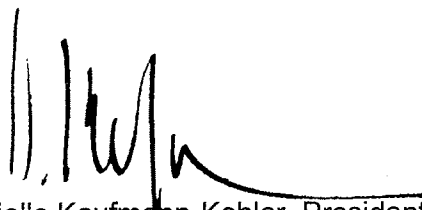
Hon. Marc Lalonde

Date: 01.02.2010



Prof. Brigitte Stern

Date: 01.02. 2010



Prof. Gabrielle Kaufmann-Kohler, President

Date: 01.02.2010



Governmental Advisory Committee

Beijing, People's Republic of China – 11 April 2013

GAC Communiqué – Beijing, People's Republic of China¹

I. Introduction

The Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN) met in Beijing during the week of 4 April 2013. Sixty-one (61) GAC Members participated in the meetings and eight (8) Observers. The GAC expresses warm thanks to the local hosts China Internet Network Information Center (CNNIC), China Organizational Name Administration Center (CONAC), and Internet Society of China for their support.

II. Internal Matters

1. New Members and Observers

The GAC welcomes Belarus, Cape Verde, Côte d'Ivoire, Lebanon, and the Republic of the Marshall Islands to the Committee as members, and The World Meteorological Organisation as an Observer.

2. GAC Secretariat

Following a request for proposals, the GAC received presentations from two organizations and agreed that one such candidate should be providing secretariat services to the GAC, with the aim of becoming operational as soon as possible. Negotiations with such organization will start immediately after the Beijing meeting.

¹ To access previous GAC advice, whether on the same or other topics, past GAC communiqués are available at: <https://gacweb.icann.org/display/gacweb/GAC+Recent+Meetings> and older GAC communiqués are available at: <https://gacweb.icann.org/display/gacweb/GAC+Meetings+Archive>.

3. GAC Leadership

The GAC warmly thanks the outgoing Vice-Chairs, Kenya, Singapore, and Sweden and welcomes the incoming Vice-Chairs, Australia, Switzerland and Trinidad & Tobago.

III. Inter-constituencies Activities

1. Meeting with the Accountability and Transparency Review Team 2 (ATRT 2)

The GAC met with the ATRT 2 and received an update on the current activities of the ATRT 2. The exchange served as an information gathering session for the ATRT 2 in order to hear GAC member views on the Review Team processes and areas of interest for governments. The GAC provided input on governmental processes and the challenges and successes that arose during the first round of reviews, and implementation of the GAC related recommendations of the first Accountability and Transparency Review Team.

2. Board/GAC Recommendation Implementation Working Group (BGRI-WG)

The Board–GAC Recommendation Implementation Working Group (BGRI–WG) met to discuss further developments on ATRT1 recommendations relating to the GAC, namely recommendations 11 and 12. In the context of Recommendation 11, the GAC and the Board have concluded the discussion and agreed on the details of the consultation process mandated per ICANN Bylaws, should the Board decide not to follow a GAC advice. With respect to Recommendation 12, on GAC Early Engagement, the BGRI-WG had a good exchange with the GNSO on mechanisms for the GAC to be early informed and provide early input to the GNSO PDP. The BGRI–WG intends to continue this discussion intersessionally and at its next meeting in Durban.

3. Brand Registry Group

The GAC met with the Brand Registry Group and received information on its origins, values and missions.

4. Law Enforcement

The GAC met with law enforcement representatives and received an update from Europol on the Registrar Accreditation Agreement (RAA).

The GAC warmly thanks the Accountability and Transparency Review Team 2, the Brand Registry Group, Law Enforcement, and the ICANN Board who jointly met with the GAC as well

as all those among the ICANN community who have contributed to the dialogue with the GAC in Beijing.

IV. GAC Advice to the ICANN Board²

1. New gTLDs

a. GAC Objections to Specific Applications

i. The GAC Advises the ICANN Board that:

- i. The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:³
 1. The application for .africa (Application number 1-1165-42560)
 2. The application for .gcc (application number: 1-1936-2101)
- ii. With regard to Module 3.1 part II of the Applicant Guidebook⁴:
 1. The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.

b. Safeguard Advice for New gTLDs

To reinforce existing processes for raising and addressing concerns the GAC is providing safeguard advice to apply to broad categories of strings (see Annex I).

c. Strings for Further GAC Consideration

In addition to this safeguard advice, that GAC has identified certain gTLD strings where further GAC consideration may be warranted, including at the GAC meetings to be held in Durban.

- i. Consequently, **the GAC advises the ICANN Board to:** not proceed beyond Initial Evaluation with the following strings : .shenzhen (IDN in Chinese), .persiangulf, .guangzhou (IDN in Chinese), .amazon (and IDNs in Japanese and Chinese), .patagonia, .date, .spa, .yun, .thai, .zulu, .wine, .vin

² To track the history and progress of GAC Advice to the Board, please visit the GAC Advice Online Register available at: <https://gacweb.icann.org/display/gacweb/GAC+Recent+Meetings>

³ Module 3.1: "The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.

⁴ Module 3.1: "The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

d. The GAC requests:

- i. a written briefing about the ability of an applicant to change the string applied for in order to address concerns raised by a GAC Member and to identify a mutually acceptable solution.

e. Community Support for Applications**The GAC advises the Board:**

- i. that in those cases where a community, which is clearly impacted by a set of new gTLD applications in contention, has expressed a collective and clear opinion on those applications, such opinion should be duly taken into account, together with all other relevant information.

f. Singular and plural versions of the same string as a TLD

The GAC believes that singular and plural versions of the string as a TLD could lead to potential consumer confusion.

Therefore **the GAC advises the ICANN Board to:**

- i. Reconsider its decision to allow singular and plural versions of the same strings.

g. Protections for Intergovernmental Organisations

The GAC stresses that the IGOs perform an important global public mission with public funds, they are the creations of government under international law, and their names and acronyms warrant special protection in an expanded DNS. Such protection, which the GAC has previously advised, should be a priority.

This recognizes that IGOs are in an objectively different category to other rights holders, warranting special protection by ICANN in the DNS, while also preserving sufficient flexibility for workable implementation.

The GAC is mindful of outstanding implementation issues and commits to actively working with IGOs, the Board, and ICANN Staff to find a workable and timely way forward.

Pending the resolution of these implementation issues, the **GAC reiterates its advice to the ICANN Board that:**

- i. appropriate preventative initial protection for the IGO names and acronyms on the provided list be in place before any new gTLDs would launch.

2. Registrar Accreditation Agreement (RAA)

Consistent with previous communications to the ICANN Board

a. the GAC advises the ICANN Board that:

- i. the 2013 Registrar Accreditation Agreement should be finalized before any new gTLD contracts are approved.

The GAC also strongly supports the amendment to the new gTLD registry agreement that would require new gTLD registry operators to use only those registrars that have signed the 2013 RAA.

The GAC appreciates the improvements to the RAA that incorporate the 2009 GAC-Law Enforcement Recommendations.

The GAC is also pleased with the progress on providing verification and improving accuracy of registrant data and supports continuing efforts to identify preventative mechanisms that help deter criminal or other illegal activity. Furthermore the GAC urges all stakeholders to accelerate the implementation of accreditation programs for privacy and proxy services for WHOIS.

3. WHOIS

The GAC urges the ICANN Board to:

- a. ensure that the GAC Principles Regarding gTLD WHOIS Services, approved in 2007, are duly taken into account by the recently established Directory Services Expert Working Group.

The GAC stands ready to respond to any questions with regard to the GAC Principles.

The GAC also expects its views to be incorporated into whatever subsequent policy development process might be initiated once the Expert Working Group concludes its efforts.

4. International Olympic Committee and Red Cross /Red Crescent

Consistent with its previous communications, **the GAC advises the ICANN Board to:**

- a. amend the provisions in the new gTLD Registry Agreement pertaining to the IOC/RCRC names to confirm that the protections will be made permanent prior to the delegation of any new gTLDs.

5. Public Interest Commitments Specifications

The GAC requests:

- b. more information on the Public Interest Commitments Specifications on the basis of the questions listed in annex II.

V. Next Meeting

The GAC will meet during the period of the 47th ICANN meeting in Durban, South Africa.

ANNEX I

Safeguards on New gTLDs

The GAC considers that Safeguards should apply to broad categories of strings. For clarity, this means any application for a relevant string in the current or future rounds, in all languages applied for.

The GAC advises the Board that all safeguards highlighted in this document as well as any other safeguard requested by the ICANN Board and/or implemented by the new gTLD registry and registrars should:

- be implemented in a manner that is fully respectful of human rights and fundamental freedoms as enshrined in international and, as appropriate, regional declarations, conventions, treaties and other legal instruments – including, but not limited to, the UN Universal Declaration of Human Rights.
- respect all substantive and procedural laws under the applicable jurisdictions.
- be operated in an open manner consistent with general principles of openness and non-discrimination.

Safeguards Applicable to all New gTLDs

The GAC Advises that the following six safeguards should apply to all new gTLDs and be subject to contractual oversight.

1. **WHOIS verification and checks** —Registry operators will conduct checks on a statistically significant basis to identify registrations in its gTLD with deliberately false, inaccurate or incomplete WHOIS data at least twice a year. Registry operators will weight the sample towards registrars with the highest percentages of deliberately false, inaccurate or incomplete records in the previous checks. Registry operators will notify the relevant registrar of any inaccurate or incomplete records identified during the checks, triggering the registrar’s obligation to solicit accurate and complete information from the registrant.
2. **Mitigating abusive activity**—Registry operators will ensure that terms of use for registrants include prohibitions against the distribution of malware, operation of botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law.
3. **Security checks**— While respecting privacy and confidentiality, Registry operators will periodically conduct a technical analysis to assess whether domains in its gTLD are being used to perpetrate security threats, such as pharming, phishing, malware, and botnets. If Registry operator identifies security risks that pose an actual risk of harm, Registry operator will notify the relevant registrar and, if the registrar does not take immediate action, suspend the domain name until the matter is resolved.

4. **Documentation**—Registry operators will maintain statistical reports that provide the number of inaccurate WHOIS records or security threats identified and actions taken as a result of its periodic WHOIS and security checks. Registry operators will maintain these reports for the agreed contracted period and provide them to ICANN upon request in connection with contractual obligations.
5. **Making and Handling Complaints** – Registry operators will ensure that there is a mechanism for making complaints to the registry operator that the WHOIS information is inaccurate or that the domain name registration is being used to facilitate or promote malware, operation of botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law.
6. **Consequences** – Consistent with applicable law and any related procedures, registry operators shall ensure that there are real and immediate consequences for the demonstrated provision of false WHOIS information and violations of the requirement that the domain name should not be used in breach of applicable law; these consequences should include suspension of the domain name.

The following safeguards are intended to apply to particular categories of new gTLDs as detailed below.

Category 1

Consumer Protection, Sensitive Strings, and Regulated Markets:

The GAC Advises the ICANN Board:

- Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm. The following safeguards should apply to strings that are related to these sectors:
 1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.
 2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.
 3. Registry operators will require that registrants who collect and maintain sensitive health and financial data implement reasonable and appropriate security measures commensurate with the offering of those services, as defined by applicable law and recognized industry standards.
 4. Establish a working relationship with the relevant regulatory, or industry self-regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.

5. Registrants must be required by the registry operators to notify to them a single point of contact which must be kept up-to-date, for the notification of complaints or reports of registration abuse, as well as the contact details of the relevant regulatory, or industry self-regulatory, bodies in their main place of business.

In the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to:

- **Children:**
 - .kid, .kids, .kinder, .game, .games, .juegos, .play, .school, .schule, .toys
- **Environmental:**
 - .earth, .eco, .green, .bio, .organic
- **Health and Fitness:**
 - .care, .diet, .fit, .fitness, .health, .healthcare, .heart, .hiv, .hospital,, .med, .medical, .organic, .pharmacy, .rehab, .surgery, .clinic, .healthy (IDN Chinese equivalent), .dental, .dentist .doctor, .dds, .physio
- **Financial:**
 - capital, . cash, .cashbackbonus, .broker, .brokers, .claims, .exchange, .finance, .financial, .fiancialaid, .forex, .fund, .investments, .lease, .loan, .loans, .market, . markets, .money, .pay, .payu, .retirement, .save, .trading, .autoinsurance, .bank, .banque, .carinsurance, .credit, .creditcard, .creditunion,.insurance, .insure, ira, .lifeinsurance, .mortgage, .mutualfunds, .mutuelle, .netbank, .reit, .tax, .travelersinsurance, .vermogensberater, .vermogensberatung and .vesicherung.
- **Gambling:**
 - .bet, .bingo, .lotto, .poker, and .spreadbetting, .casino
- **Charity:**
 - .care, .gives, .giving, .charity (and IDN Chinese equivalent)
- **Education:**
 - degree, .mba, .university
- **Intellectual Property**
 - .audio, .book (and IDN equivalent), .broadway, .film, .game, .games, .juegos, .movie, .music, .software, .song, .tunes, .fashion (and IDN equivalent), .video, .app, .art, .author, .band, .beats, .cloud (and IDN equivalent), .data, .design, .digital, .download, .entertainment, .fan, .fans, .free, .gratis, .discount, .sale, .hiphop, .media, .news, .online, .pictures, .radio, .rip, .show, .theater, .theatre, .tour, .tours, .tvs, .video, .zip
- **Professional Services:**
 - .abogado, .accountant, .accountants, .architect, .associates, .attorney, .broker, .brokers, .cpa, .doctor, .dentist, .dds, .engineer, .lawyer, .legal, .realtor, .realty, .vet
- **Corporate Identifiers:**
 - .corp, .gmbh, .inc, .limited, .llc, .llp, .ltda, .ltd, .sarl, .srl, .sal
- **Generic Geographic Terms:**
 - .town, .city, .capital

- .reise, .reisen⁵
- .weather
- .engineering
- .law
- **Inherently Governmental Functions**
 - .army, .navy, .airforce
- In addition, applicants for the following strings should develop clear policies and processes to minimise the risk of cyber bullying/harassment
 - .fail, .gripe, .sucks, .wtf

The GAC further advises the Board:

1. In addition, some of the above strings may require further targeted safeguards, to address specific risks, and to bring registry policies in line with arrangements in place offline. In particular, a limited subset of the above strings are associated with market sectors which have clear and/or regulated entry requirements (such as: financial, gambling, professional services, environmental, health and fitness, corporate identifiers, and charity) in multiple jurisdictions, and the additional safeguards below should apply to some of the strings in those sectors:
 6. At the time of registration, the registry operator must verify and validate the registrants' authorisations, charters, licenses and/or other related credentials for participation in that sector.
 7. In case of doubt with regard to the authenticity of licenses or credentials, Registry Operators should consult with relevant national supervisory authorities, or their equivalents.
 8. The registry operator must conduct periodic post-registration checks to ensure registrants' validity and compliance with the above requirements in order to ensure they continue to conform to appropriate regulations and licensing requirements and generally conduct their activities in the interests of the consumers they serve.

Category 2

Restricted Registration Policies

The GAC advises the ICANN Board:

1. **Restricted Access**
 - As an exception to the general rule that the gTLD domain name space is operated in an open manner registration may be restricted, in particular for strings mentioned under category 1

⁵ Austria, Germany, and Switzerland support requirements for registry operators to develop registration policies that allow only travel-related entities to register domain names. Second Level Domains should have a connection to travel industries and/or its customers

above. In these cases, the registration restrictions should be appropriate for the types of risks associated with the TLD. The registry operator should administer access in these kinds of registries in a transparent way that does not give an undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue disadvantage.

2. Exclusive Access

- For strings representing generic terms, exclusive registry access should serve a public interest goal.

- In the current round, the GAC has identified the following non-exhaustive list of strings that it considers to be generic terms, where the applicant is currently proposing to provide exclusive registry access
 - .antivirus, .app, .autoinsurance, .baby, .beauty, .blog, .book, .broker, .carinsurance, .cars, .cloud, .courses, .cpa, .cruise, .data, .dvr, .financialaid, .flowers, .food, .game, .grocery, .hair, .hotel, .hotels, .insurance, .jewelry, .mail, .makeup, .map, .mobile, .motorcycles, .movie, .music, .news, .phone, .salon, .search, .shop, .show, .skin, .song, .store, .tennis, .theater, .theatre, .tires, .tunes, .video, .watches, .weather, .yachts, .クラウド [cloud], .ストア [store], .セール [sale], .ファッション [fashion], .家電 [consumer electronics], .手表 [watches], .書籍 [book], .珠宝 [jewelry], .通販 [online shopping], .食品 [food]

ANNEX II

List of questions related to Public Interest Commitments Specifications

1. Could a third party intervene or object if it thinks that a public interest commitment is not being followed? Will governments be able to raise those sorts of concerns on behalf of their constituents?
2. If an applicant does submit a public interest commitment and it is accepted are they able to later amend it? And if so, is there a process for that?
3. What are ICANN's intentions with regard to maximizing awareness by registry operators of their commitments?
4. Will there be requirements on the operators to maximize the visibility of these commitments so that stakeholders, including governments, can quickly determine what commitments were made?
5. How can we follow up a situation where an operator has not made any commitments? What is the process for amending that situation?
6. Are the commitments enforceable, especially later changes? Are they then going into any contract compliance?
7. How will ICANN decide whether to follow the sanctions recommended by the PIC DRP? Will there be clear and transparent criteria? Based on other Dispute Resolution Procedures what is the expected fee level?
8. If serious damage has been a result of the past registration policy, will there be measures to remediate the harm?

GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué

- scorecard to serve as the basis of the GAC approach to Brussels ICANN Board/GAC consultation meeting 28 February-1 March 2011

Introduction

The scorecard below represents the considered efforts of the GAC to distil the key elements of consensus advice regarding the introduction of new gTLDs it has been providing the ICANN Board since March, 2007.

As the GAC noted in its Cartagena Communiqué, the GAC's initial advice, presented in the form of Principles, pre-dated both the completion of the GNSO's Recommendations on new gTLDs and the ICANN Board's subsequent adoption of those Recommendations in June, 2008. The GAC has sought from the outset of its deliberations regarding the public policy aspects related to the introduction of new gTLDs to contribute to the bottom-up, consensus-based policy development process within ICANN. As per the ICANN Bylaws, the GAC provides advice directly to the ICANN Board. Once the GAC forwards its advice to the ICANN Board, the GAC understands that it is within the ICANN Board's remit to instruct ICANN staff to take the GAC's advice into account in the development of the implementation plan for the introduction of new gTLDs. The GAC therefore welcomes the opportunity presented by the ICANN Board's agreement to hold a meeting with the GAC to review its longstanding and outstanding concerns regarding ICANN's proposed implementation plan for the introduction of new gTLDs. From the GAC's perspective, the Brussels meetings are not only an appropriate but a critical next step in ensuring the perspectives of governments are fully taken into account in the ICANN private sector-led, multi-stakeholder model that ICANN represents.

Twelve outstanding issues

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1. The objection procedures including the requirements for governments to pay fees

Recommended GAC Advice:

The GAC advises the ICANN Board to instruct ICANN staff to delete the procedures related to “Limited Public Interest Objections” in Module 3.

Explanation:

Although the new heading has been renamed from “Morality and Public Order Objections”, the body of the text remains unchanged and contains the same fundamental flaws which can only be remedied through deletion.

Specifically, the requirement that governments pay fees and must be bound by determinations by the International Centre for Expertise of the International Chamber of Commerce, which will in turn be guided by the findings of “three experts recognized as eminent jurists of international reputation”, is contrary to the sovereign right of governments to interpret and apply principles of international law on a country-by-country basis. Governments cannot be bound by the determinations of private individuals or organizations on matters that pertain to national law.

The requirement is also inconsistent with the provisions in ICANN’s Bylaws that call for governments to provide public policy advice to the ICANN Board through the Governmental Advisory Committee.

Lastly, there are no “generally accepted legal norms relating to morality and public order that are recognized under international principles of law” (Module 3, Article 2, e, iii), nor is it feasible to expect that any panel of “experts” could reach a determination whether a particular proposed new gTLD string would be considered objectionable on such grounds.

2. Procedures for the review of sensitive strings

1. String Evaluation and Objections Procedure

The GAC advises the ICANN Board to instruct ICANN staff to amend the following procedures related to the Initial Evaluation called for in Module 2 to include review by governments, via the GAC.

At the beginning of the Initial Evaluation Period, ICANN will provide the GAC with a detailed summary of all new gTLD applications. Any GAC member may raise an objection to a proposed string for any reason.

The GAC will consider any objection raised by a GAC member or members, and agree on advice to forward to the ICANN Board.

GAC advice could also suggest measures to mitigate GAC concerns. For example, the GAC could advise that additional scrutiny and

conditions should apply to strings that could impact on public trust (e.g. '.bank').

In the event the Board determines to take an action that is not consistent with GAC advice pursuant to Article XI Section 2.1 j and k, the Board will provide a rationale for its decision.

Explanation:

This proposal meets a number of compelling goals. First it provides governments with a more appropriate mechanism than the “Limited Public Interest Objections” procedure to communicate objections via the GAC. It is also intended to diminish the potential for blocking of top level domain strings considered objectionable by governments, which harms the architecture of the DNS and undermines the goal of universal resolvability.

Affording governments the early opportunity, through the GAC, to provide advice to the ICANN Board about particular proposed strings is supportive of ICANN’s commitment to ensure that its decisions are in the global public interest and represent community consensus.

2. *Expand Categories of Community-based Strings*

The GAC advises the ICANN Board to instruct ICANN staff to amend the provisions and procedures contained in Modules 1 and 3 to clarify the following:

1. “Community-based strings” include those that purport to represent or that embody a particular group of people or interests based on historical, cultural or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non exhaustive). In addition, those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse, should also be considered “community-based” strings.
2. Applicants seeking such strings should be required to affirmatively identify them as “community-based strings” and must demonstrate their affiliation with the affected community, the specific purpose of the proposed TLD, and –when opportune– evidence of support or non-objection from the relevant authority/ies that the applicant is the appropriate or agreed entity for purposes of managing the TLD.
3. In the event the proposed string is either too broad to effectively identify a single entity as the relevant authority or appropriate manager, or is sufficiently contentious that an appropriate manager cannot be identified and/or agreed, the application should be rejected.
4. The requirement that objectors must demonstrate “material detriment to the broader Internet community” should be amended to reflect simply “material detriment”, as the former represents an extremely vague standard that may prove impossible to

satisfy.

5. Individual governments that choose to file objections to any proposed “community-based” string should not be required to pay fees.

Explanation:

The proposed approach would remedy the failure in the draft Applicant Guidebook to incorporate the GAC’s previous advice that ICANN’s new gTLD process should respect the legitimate interests of governments regarding terms with national, cultural, geographic and religious significance. It also anticipates the strong possibility that there will be proposed new gTLD strings for which an appropriate manager cannot be identified and/or agreed, which should cause the application to be rejected as a community-based string. It corrects an impossibly vague standard of “detriment to the broader Internet community” with a more practical and realistic standard of “material detriment” to the community in question. Finally, this proposal recognizes the right of governments to protect their perceived national interests through the Community objections process without the obligation to pay fees.

3. Root Zone Scaling

Recommended GAC Advice:

1. The Board should continue implementing a monitoring and alerting system and ensure a) that ICANN can react predictably and quickly when there are indicators that new additions and changes are straining the root zone system, and b) that the processes and possible resulting restorative measures that flow from its results are fully described in the Application Guidebook before the start of the first application round.
2. The Board commits to defer the launch of a second round or batch of applications unless an evaluation shows that there are indications from monitoring the root system etc. that a first (limited) round did not in any way jeopardize the security and stability of the root zone system.
3. The Board commits to make the second round or batch of applications contingent on a clean sheet from full technical and administrative assessment of impact of the first round with recommendations which should go out to public comment for approval.
4. The Board commits to avoid the possibility that other activities will be impacted by the possible diversion of resources to processing new gTLD applications.
5. The Board should ensure that ICANN can effectively address the specific needs of applicants from different, perhaps non-English speaking cultures, and with different legal environments.
6. The Board should monitor the pace and effectiveness of ICANN’s management of contract negotiations for new gTLDs in a potential situation of 200 to 300 simultaneous applications and evaluations.
7. The Board is confident that all relevant actors (IANA, root server operators, etc) are sufficiently informed about what is expected from them in terms of work loadings and resources in order to fulfil their respective roles, in particular the pre-

delegation checking, approvals, implementation of potentially 200 to 300 root zone changes a year and expected post-delegation changes.

4. Market and Economic Impacts

The GAC advises the ICANN Board to instruct ICANN staff to amend the final Draft Applicant Guidebook to incorporate the following:

1. Criteria to facilitate the weighing of the potential costs and benefits to the public in the evaluation and award of new gTLDs.
2. A requirement that new gTLD applicants provide information on the expected benefits of the proposed gTLD, as well as information and proposed operating terms to eliminate or minimize costs to registrants and consumers.
3. Due diligence or other operating restrictions to ensure that Community-based gTLDs will in fact serve their targeted communities and will not broaden their operations in a manner that makes it more likely for the registries to impose costs on existing domain owners in other TLDs.

Explanation:

The economic studies conducted by Katz, Rosston and Sullivan contain important findings that the past introduction of new gTLDs provided minimal public benefits in terms of competition for existing gTLDs and relieving name scarcity. The studies further state clearly that the introduction of new gTLDs had imposed costs on intellectual property owners in diluted brand strength, defensive registrations, and other costs associated with protecting their brands.

5. Registry – Registrar Separation

The GAC advises the ICANN Board to instruct ICANN staff to amend the proposed new registry agreement to restrict cross-ownership between registries and registrars, in those cases where it can be determined that the registry does have, or is likely to obtain, market power. The GAC further advises the ICANN Board that it considers the absence of a thorough and reasoned explanation of its decision in November 2010 to reverse its earlier decision of March 2010 to maintain "strict separation of entities offering registry services and those acting as registrars" and that "no co-ownership will be allowed" to be inconsistent with its commitments under the Affirmation of Commitments.

Explanation:

The CRA International report commissioned by ICANN noted that vertical integration between registries and registrars could foster both pre-competitive and anticompetitive outcomes. As the key issue is whether a gTLD has market power, it would only be

appropriate for ICANN to relax or lift restrictions on vertical integration in cases where it is clear that a gTLD faces or will face substantial competition. Such analysis would benefit from consultations with relevant antitrust authorities.

Further, ICANN has committed to provide a thorough and reasoned explanation of ICANN decisions, the rationale thereof and the sources of data and information on which ICANN relies. This has not been done yet to explain how the Board moved from a position in March 2010, as articulated in a Board resolution, of no cross ownership, to the May 31, 2010 staff proposal contained in draft Applicant Guidebook, version 4 of de minimus (i.e., no more than 2%) cross ownership, to the November 5, 2010 decision allowing full cross ownership. ICANN staff have provided an justification for the second decision but not an explanation of why ICANN's position changed so dramatically in the space of 8 months.

6. Protection of Rights Owners and consumer protection issue

1. Rights Protection: Trademark Clearing House (TC)

GAC Advice

The GAC proposes the following refining changes that significantly improve the operation and achieve the maximum impact of the TC:

- The TC should be permitted to accept all types of intellectual property rights that are recognized under the national law of the country or countries under which the registry is organized or has its principal place of business. The only mandatory requirement for new registry operators will be to recognize national and supranational trademark registrations issued before June 26, 2008 and court-validated common law trademarks.
- Sunrise services and IP claims should both be mandatory for registry operators because they serve different functions with IP claims serving a useful notice function beyond the introductory phase.
- IP claims services and sunrise services should go beyond exact matches to include exact match plus key terms associated with goods or services identified by the mark) e.g. “Kodakonlineshop”) and typographical variations identified by the rights holder.
- All trademark registrations of national and supranational effect, regardless of whether examined on substantive or relative grounds, must be eligible to participate in the pre-launch sunrise mechanisms.
- Protections afforded to trademark registrations do not extend to applications for registrations, marks within any opposition period or registered marks that were the subject of successful invalidation, cancellation or rectification proceedings.
- The IP claims service should notify the potential domain name registrant of the rights holder’s claim and also notify the rights holder of the registrant’s application for the domain name.
- The TC should continue after the initial launch of each gTLD.

- Rights holders, registries and registrars should all contribute to the cost of the TC because they all benefit from it.

Explanation and argument

The GAC believes that the TC as currently framed in the Applicant Guidebook needs to be significantly improved because a) there is lack of clarity as to the modalities of the TC process and operation and b) there are problems with its applicability. While the GAC recognizes that the Trademark Clearing House (TC) mechanism was not introduced as a rights protection mechanism but as a cost reduction tool, the GAC believes it can provide effective and efficient means to enable rights holders to submit their trade mark registrations with a single entity rather than with every registry in which they may wish to obtain a second-level registration.

There is also a major inconsistency between Sunrise and IP Claims services because Sunrise services only recognize trademarks that are registered in countries conducting a so-called substantive review or examination. The consequences of this are significant in terms of eligibility. In Europe, for example, all “Community Trademarks” (i.e. any trademark which is pending registration or has been registered in the European Union as a whole rather than on a national level within the EU) and most national trademarks are excluded from the Sunrise service. These amendments would ensure that all trademark registrations could qualify for participation in the pre-launch sunrise mechanism, consistent with existing best practices (e.g. the policies for .eu, .tel, and .asia).

With regard to presentation in the Applicant Guidebook, the GAC recommends that the text could more clearly indicate (perhaps with a flow chart) at what time during the evaluation process, and by what entity, objections to potential trademark infringements should be submitted.

2. *Rights Protection: Uniform Rapid Suspension (URS):*

GAC Advice:

- Significantly reduce the timescales. See attached table for proposed changes.
- The URS processes should be streamlined as follows:
 - The complaint should be simplified by replacing the 5,000 word free text limit + unlimited attachments [para 1.2] with a simple pro forma standardised wording with the opportunity for not more than 500 words of freeform text and limit the attachments to copies of the offending website.
 - Decisions should be taken by a suitably qualified ‘Examiner’ and not require panel appointments..
 - Where the complaint is based upon a valid registration, the requirement that the jurisdiction of registration incorporate substantive examination (paras 1.2f (i) and 8.1a) should be removed.
 - If, as is expected in the majority of cases, there is no response from the registrant, the default should be in favour of the

complainant and the website locked. The examination of possible defences in default cases according to para 8.4(2) would otherwise give an unjustified privilege to the non-cooperating defendant.

- The standard of proof (para 8.2) should be lowered from “clear and convincing evidence” to a preponderance of evidence”.
- The “bad faith” requirement in paras 1.2f), 1.2g) and 8.1c) is not acceptable. Complainants will in only rare cases prevail in URS proceedings if the standards to be fulfilled by registrants are lax. Correspondingly, the factors listed in paras 5.7a) (“bona fide”) and b) “been commonly known by the domain name”) can hardly allow a domain name owner to prevail over the holders of colliding trademarks.
- A ‘loser pays’ mechanism should be added. In addition, registrants who have lost five or more URS proceedings should be deemed to have waived the opportunity to respond to future URS complaints (this amendment corresponds to the “two strikes” provision which applies to rights holders).
- However, there should be a clear rationale for appeal by the complainant. The time for filing an appeal in default cases must be reduced from 2 years to not more than 6 months. In addition, the examination of possible defences in default cases according to para 8.4(2) means an unjustified privilege of the non-cooperating defendant.
- The URS filing fee should be US\$200-US\$300 and minor administrative deficiencies should not result in dismissal of the URS complaint.
- A successful complainant should have the right of first refusal for transfer of the disputed domain name after the suspension period so that the complainant is not forced to pursue a UDRP proceeding to secure a transfer.
- The URS should go beyond ‘exact’ matches and should at least include exact + goods/other generic words e.g. “Kodakonlineshop”.

Explanation and argument

The generally acknowledged rapid escalation of the opportunity for cybersquatting caused by the proposed new gTLD round is an issue of major concern for governments in view of its likely impact on business, consumer and economic welfare, both nationally and globally. The URS mechanism was recommended specifically to tackle obvious examples of opportunistic cybersquatting by providing rights holders with a cost effective and swift remedy.

The GAC advises therefore that these proposed amendments to the URS are most important. Without these amendments, the GAC believes that URS will fail to meet its stated purpose and will be rendered ineffective and useless.

In particular, the GAC considers that the current proposals are too cumbersome and lengthy to support public policy objectives of harm reduction. Surveys and consultations undertaken by GAC representatives show that few in-house trade mark counsel believe that the proposed URS system in the final DAG provides a cost effective, expedited process in clear cut cases of trade mark abuse. Furthermore, the process too closely mirrors the UDRP mechanisms which are intended to deal with more complex disputes. The URS

as currently devised does not contain sufficient deterrence to serial cybersquatters. These changes would bring the URS back into line with its original objectives as agreed by the IRT and STI by ensuring that the URS provides an effective and rapid remedy, with more streamlined processes and faster turn round of decisions.

While it is noted that that the URS only covers intentional bad faith conduct, the GAC underlines that ICANN should make every effort to ensure that safeguards are in place to facilitate reinstatement as soon as possible in a genuine case of accidental rights infringement, through illness or some other legitimate absence, an individual or small/medium sized enterprise, has failed to respond within the timescale available.

3. Rights Protection: Post-delegation Dispute Resolution Procedure (PDDRP)

GAC Advice:

The GAC recommends that:

- The standard of proof be changed from “clear and convincing evidence” to a “preponderance of evidence”.
- The second level registrations that form the underlying basis of a successful PDDRP complaint should be deleted.
- The requirement of “substantive examination” in para 9.2.1(i) should be deleted.
- A new para 6.1 a) be added: “being identical to the complainant’s mark in relation to goods and services which are identical to those for which the complainant’s mark is registered. This would not apply if the registrant has a better right to the mark. In particular the registrant will in normal circumstances have a better right if the mark has been registered prior to the registration of the complainant’s mark.”
- Regarding the second level (para 6.2), the registrant operator should be liable if he/she acts in bad faith or is grossly negligent in relation to the circumstances listed in para 6.a)-d).
- The requirement in para 7.2.3 lit.d) that the complainant has to notify the registry operator at least 30 days prior to filing a complaint is burdensome and should be reduced to 10 days if not deleted entirely.

Para 19.5 should be amended as follows: “In cases where the Expert Determination decides that a registry operator is liable under the standards of the Trademark PDDRP, ICANN will impose appropriate remedies that are in line with the Determination.

Explanation and Argument These changes would ensure that the PDDRP is consistent with the requirements in a civil action for contributory trademark infringement action or unfair competition and that the abusive second level registrations are deleted after a successful PDDRP complaint.

The GAC believes that the liability criteria in the Applicant Guidebook are too lax. In particular, according to para 6, the liability of the registry operator is only triggered by behaviours such as “taking unfair advantage”, “unjustifiable impairment of the distinctive

character of the reputation of the complainant's mark" or "impermissible likelihood of confusion with the complainant's mark". The proposed changes to para 6 are therefore intended to strengthen the criteria.

The GAC considers that para 19.5 grants ICANN too much discretion in choosing the remedies it imposes on the registry operators and recommends that the remedies be consistent with the Expert Determination.

Ensuring full and effective compliance with the rules is a crucial issue post-delegation. The GAC believes therefore that ICANN needs to deploy a sufficiently large team for this purpose with an appropriate budget allocation.

4. Consumer Protection

Recommended GAC Advice:

Points of Contact for Abuse: The GAC proposes the following amendment to the "Maintain an abuse point of contact" paragraph in the DAG to include government agencies which address consumer protection:

A registry operator must assist law enforcement, government agencies and agencies endorsed by governments with their enquiries about abuse complaints concerning all names registered in the TLD, including taking timely action, as required, to resolve abuse issues.

Effective Contract Compliance: The GAC advises the Board to ensure that ICANN's contract compliance function is adequately resourced to build confidence in ICANN's ability to enforce agreements between ICANN and registries and registrars.

Explanation and argument:

There are concerns that internationally, "law enforcement" is interpreted as solely referring to police agencies, which would exclude other enforcers that do not fall under this category. Specifically stating "government agencies and agencies endorsed by a government" should (in theory) quash any ambiguity. In addition, the challenges facing ICANN's current contract compliance efforts are expected to be magnified with the introduction of an unknown number of new gTLDs.

Vetting of certain strings

The GAC proposes that gTLD strings which relate to any generally regulated industry (e.g. .bank, .dentist, .law) should be subject to more intensive vetting than other non-geographical gTLDs.

Explanation and argument

The evaluation processes in the Applicant Guidebook offer safeguards to minimise abuse through for example objections on "community grounds." However, government authorities and agencies are concerned about the lack of proper safeguards provided by additional rigorous procedures for vetting applicants.

Why does the GAC believe that there is a need to enhance consumer protection?

National consumer protection authorities and fair trading agencies have expressed concern that the expansion of the number of gTLDs will establish certain consumer-orientated gTLDs that will be particularly prone to abuse and risk of increased opportunities for misrepresentation to consumers and generally expansion of the means for conducting online consumer fraud. Moreover, there is a perceived risk that certain gTLDs may become synonymous with criminal activity which may ultimately undermine consumer trust in online markets generally.

7. Post-Delegation Disputes

The GAC advises the ICANN Board to instruct ICANN staff to amend the Applicant Guidebook in the following way:

1. Change the wording in the sample letter of Government support in AG back to the wording in DAGv4 and keeping the new paragraph 7.13 of the new gTLD registry agreement with the changed wording from "may implement" to "will comply". E.g change the wording from "may implement" back to "will comply" with a legally binding decision in the relevant jurisdiction.
2. In addition describe in the AG that ICANN will comply with a legally binding decision in the relevant jurisdiction where there has been a dispute between the relevant government or public authority and registry operator.

Explanation:

Even though ICANN's commitment to comply with court orders or legally binding decisions by public authorities, the registry agreement between ICANN and the registry should have clear wording on this commitment to make sure that this obligation to the Government stands out as a clear and underlying premise for entering into the agreement

8. Use of geographic names:

1. Definition of geographic names

Recommended GAC Advice:

The GAC asks ICANN to ensure that the criteria for community objections are implemented in a way that appropriately enables governments to use this instrument to protect their legal interest.

ICANN refers to detailed explanations given in the “Final Draft Applicant Guidebook”.

The GAC is of the view that the criteria for community objections do still not meet these requirements. The problem could be solved, if a free of charge objection mechanism would allow governments to protect their interest and to define names that are to be considered geographic names. This implies that ICANN will exclude an applied for string from entering the new gTLD process when the government formally states that this string is considered to be a name for which this country is commonly known as

The GAC considers that the provisions in DAG4 in relation to city names carry the danger that an applicant could seek to avoid the safeguard of government support or non-objection if the applicant simply states that the intended use of the name is for non-community purposes.

The GAC asks ICANN to review the proposal in the DAG in order to ensure that this potential does not arise.

ICANN states that applicants are required to provide a description/purpose for the TLD, and to adhere to the terms and condition of submitting an application including confirming that all statements and representations contained in the application are true and accurate.

The GAC is of the view that this statement does not reflect fully its concerns and asks for further explanations. The problem could be solved, if a free objection mechanism would allow governments to protect their interest.

The GAC reminds the Board that governments need time to consult internally before deciding on whether or not to deliver a letter of approval or non-objection.

ICANN explains that it has not been decided how long the application period will be open from the launching of the gTLD program and recalls that there will be a four months communications campaign prior to the launch.

No further action required by now.

The GAC reiterates its position that governments should not be required to pay a fee for raising objections to new gTLD applications.

It is the view of the ICANN Board that governments that file objections should be required to cover costs of the objection process just like any other objector.

The problem could be solved, if a free objection mechanism would allow governments to protect their interest.

2. Further requirements regarding geographic names

The GAC clarifies that it is a question of national sovereignty to decide which level of government or which administration is responsible for the filing of letters of support or non-objection. There may be countries that require that such documentation has to be filed by the central government - also for regional geoTLDs; in other countries the responsibility for filing letters of support may rest

with sub-national level administrations even if the name of the capital is concerned. GAC requests some clarification on this in the next version of the Applicants Guidebook.

According to the current DAG applications will be suspended (pending resolution by the applicants), if there is more than one application for a string representing a certain geographic name, and the applications have requisite government approvals. The GAC understands such a position for applications that have support of different administrations or governmental entities. In such circumstances it is not considered appropriate for ICANN to determine the most relevant governmental entity; the same applies, if one string represents different geographic regions or cities. Some governments, however, may prefer not to select amongst applicants and support every application that fulfils certain requirements. Such a policy may facilitate decisions in some administrations and avoid time-consuming calls for tenders. GAC encourages ICANN to process those applications as other competing applications that apply for the same string.

9. Legal Recourse for Applications:

In commenting DAG4 GAC emphasised that a denial of any legal recourse – as stipulated in the guidebook - is inappropriate. In its response the ICANN Board stated that it does not believe that ICANN should expose itself to costly lawsuits any more than is appropriate.

The GAC reiterates its concern that excluding the possibility of legal recourse might raise severe legal problems. GAC therefore urges the ICANN Board to seek legal advice in major jurisdiction whether such a provision might cause legal conflicts – in particular but not limited to US and European competition laws. If ICANN explains that it has already examined these legal questions carefully and considering the results of these examinations still adheres to that provision, GAC will no longer insist on its position. However, the GAC expects that ICANN will continue to adhere to the rule of law and follow broad principles of natural justice. For example, if ICANN deviates from its agreed processes in coming to a decision, the GAC expects that ICANN will provide an appropriate mechanism for any complaints to be heard.

10. Providing opportunities for all stakeholders including those from developing countries

Main issues

1. Cost Considerations

“ GAC urged ICANN to set technical and other requirements, including cost considerations, at a reasonable and proportionate level in order not to exclude stakeholders from developing countries from participating in the new gTLD process.”

GAC: new gTLD applications from municipalities and local governments in developing countries

2. Language diversity

Key documents produced by ICANN must be available in all UN languages within a reasonable period in advance of the launch of the gTLD round. The GAC strongly recommends that the communications strategy for the new gTLD round be developed with this issue of inclusiveness as a key priority”.

3. Technical and logistics support

4. Outreach – as per Joint AC/SO recommendations

5. Joint AC/SO Working Group on support for new gTLD applicants.

On 10th December 2010 the GAC through its Cartagena GAC communiqué stated as follows: “The GAC welcomed an update on the work of the Joint AC/SO Working Group on support, and encourages the Working Group to continue their efforts, particularly with regard to further outreach with developing countries” further, the GAC urged ICANN to adopt recommendations of the Joint AC/SO Working Group.

Recommendations of the Joint AC/SO Working Group:

Who should receive Support?

- Non-governmental Organizations (NGOs), civil society and not-for-profit organizations
- Limited Community based applications such as cultural, linguistic and ethnic
- Applications in languages whose presence on the web is limited
- Local entrepreneurs, in those markets where market constraints make normal business operations more difficult
- Applicants located in emerging economies

Type of support:

- Cost Reduction Support
- Sponsorship and other funding support
- Modifications to the financial continued operation instrument obligation
- Technical support
- Logistical support
- Obligation Technical support for applicants in operating or qualifying to operate a gTLD
- gTLD Exception to the rules requiring separation of the Registry and Registrar function

6. Applications from Governments or National authorities (especially municipal councils and provincial authorities) – special consideration for applications from developing countries

GAC communiqué’s on the issue:

- i. Brussels Communiqué

The GAC commented that the new gTLD process should meet the global public interest consistent with the Affirmation of Commitments. It therefore urged ICANN to set technical and other requirements, including cost considerations, at a reasonable and proportionate level in order not to exclude developing country stakeholders from participating in the new gTLD-process. Key documents should be available in all UN languages. The GAC urges that the communications and outreach strategy for the new gTLD round be developed with this issue of inclusiveness as a key priority.

ii. Nairobi Communiqué

The GAC believed that instead of the then proposal of single-fee requirement, a cost-based structure of fees appropriate to each category of TLD would:

- a) prevent cross subsidization and
- b) better reflect the project scale,

This would improve logistical requirements and financial position of local community and developing country stakeholders who should not be disenfranchised from the new TLD round.

Further the board believes that :

- a. New gTLD process is developed on a cost recovery model.
- b. Experience gained from first round will inform decisions on fee levels, and the scope for discounts and subsidies in subsequent rounds.
- c. Non-financial means of support are being made available to deserving cases.
- i. Proposed that the following be entertained to achieve cost reduction:
 - Waiving the cost of Program Development (\$26k).
 - Waiving the Risk/Contingency cost (\$60k).
 - Lowering the application cost (\$100k)
 - Waiving the Registry fixed fees (\$25k per calendar year), and charge the Registry- Level Transaction Fee only (\$0.25 per domain name registration or renewal).
- ii. Proposed that the reduced cost be paid incrementally, which will give the applicants/communities from developing countries more time to raise money, and investors will be more encouraged to fund an application that passes the initial evaluation.
- iii. Believe that communities from developing countries apply for new gTLDs according to an appropriate business model taking into consideration the realities of their regions. ICANN's commitment towards supporting gTLD applicants in communities from developing countries will be a milestone to the development of the overall Internet community in Africa and other developing regions.

A. Other Developing world Community comments

Rolling out new gTLD and IDNs was done in a hurry and without basis on a careful feasibility study on the impact that this rollout will have on developing countries. For some representatives, this is a massive roll out of gTLDs and IDNs that will find many developing countries unprepared and unable to absorb it. There is the fear that there might be serious consequence in terms of economic impact to developing countries.

11. Law enforcement due diligence recommendations to amend the Registrar Accreditation Agreement as noted in the Brussels Communiqué

The GAC advises the ICANN Board to instruct ICANN staff to amend the final Draft Applicant Guidebook as follows:

Module 1:

1. Include other criminal convictions as criteria for disqualification, such as Internet-related crimes (felony or misdemeanor) or drugs.
2. Assign higher weight to applicants offering the highest levels of security to minimize the potential for malicious activity, particularly for those strings that present a higher risk of serving as venues for criminal, fraudulent or illegal conduct (e.g. such as those related to children, health-care, financial services, etc.)

Module 2:

1. Add domestic screening services, local to the applicant, to the international screening services.
2. Add criminal background checks to the Initial Evaluation.
3. Amend the statement that the results of due diligence efforts will not be posted to a positive commitment to make such results publicly available
4. Maintain requirements that WHOIS data be accurate and publicly available.

Explanation:

These amendments will improve the prospects for mitigating malicious conduct and ensuring that criminal elements are hindered from using the DNS for criminal and illegal activities. The GAC also strongly encourages, and will contribute LEA expertise to this activity, further work on the high level security zone requirements.

12. The need for an early warning to applicants whether a proposed string would be considered controversial or to raise sensitivities (including geographical names)

In conjunction with the GAC's proposed amendments to the Objections Procedures, to Community-based strings, and Geographic

Names, the GAC advises ICANN to reconsider its objection to an “early warning” opportunity for governments to review potential new gTLD strings and to advise applicants whether their proposed strings would be considered controversial or to raise national sensitivities.

Appendix: Background Material

1. Intellectual Property Rights

National governments have significant public policy concerns that the expansion of gTLDs will increase the level of fraud and abuse on the Internet, which will harm consumers, businesses, and other users of the Internet. The GAC advises the ICANN Board that the current proposed mechanisms to protect consumers and trademark rights from harm and abuse are inadequate and unacceptable. It is crucial that adequate mechanisms be adopted now -- and not after the first round of new gTLDs is introduced -- to ensure that the risk of such increased fraud and abuse is mitigated.

The GAC restates its previously articulated concerns that ICANN have in place an effective compliance program with sufficient staff and resources before ICANN launches the new gTLD program.

Why is this an issue of public policy concern for the GAC?

Trademark law protects consumers from deception and confusion and protects trademark owners' property rights from infringement. This dual basis, which is reflected in the laws of every GAC member country, mirrors the GAC's public policy concern in the rights protection issue.

The GAC acknowledges the potential commercial opportunities associated with the introduction of new gTLDs subject to a set of rules with adequate mechanisms for rights protection.

However, the GAC has nonetheless always regarded the risks to brand-owners associated with a major expansion of the gTLD space as a major public policy concern that must be carefully addressed to ensure that the opportunities and benefits outweigh the costs. In particular, many trademark owners will be forced to purchase second level defensive registrations in order to avoid misuse of their trademarks. Purchasing second level registrations will be costly and unlikely to prevent all possible misuse. The GAC notes that the significant cost burden for business arising from defensive registrations to protect brands and trade marks was described in the economic analysis undertaken by Katz, Rosston and Sullivan

The rights protection mechanisms to be established in the Applicant Guidebook are therefore crucial and must offer practical and

comprehensive approaches consistent with existing national legal frameworks and established best practice.

Once implemented in the first round of gTLD applications, ICANN should commission an independent review of the operation of the rights protections mechanisms in order to establish their effectiveness and practicability, to identify any deficiencies and scope for further improvement, and to make recommendations for public comment on how they might be changed prior to the second round of applications.

Relevant history:

The GAC's recent interaction with the Board on Protection of Rights Owners and consumer protection during 2010

The GAC noted in its Nairobi communiqué the recommendations of the Special Trade Marks Issues Review Team. The GAC Chair stated in his letter dated 10 March 2010 to the ICANN Chair regarding DAGv3 that it

is important to ensure that intellectual property rights are properly respected in the new gTLD space consistent with national and international law and standards. The GAC expects that the proposed Trademark Clearing House should be made available to all trademark owners, irrespective of the legal regime they operate under, and that an effective and sustainable Uniform Rapid Suspension (URS), with appropriate remedies, and a Post Delegation Dispute Resolution Policy are established to ensure appropriate trade mark protection. While these initiatives are broadly welcomed therefore in serving to help address the concerns of brand owners, the GAC believes that they require further refining. In particular, "substantive examination" should be re-defined so that registrations examined on "absolute grounds" are included in order to ensure broader availability of the URS.

The Chair of ICANN responded on 5 August 2010 as follows:

The GAC comments, in concert with other comments, were taken in account in version 4 of the Applicant Guidebook that, for the first time, included the set of proposed intellectual property rights protection mechanisms. In particular, ICANN has broadened the types of trademark registrations that must be honored in offering a "Sunrise" service and all new registries employing an IP Claims service must honor trademarks registered in all jurisdictions. The types of registrations offered protections have also been broadened for the Uniform Rapid Suspension Service, one of the new post-delegation rights protection mechanisms. The Post Delegation Dispute Resolution Policy has also been amended in response to specific recommendations from the ICANN community.

After due consideration of this response and the amendments contained in DAGv4, the GAC took the view, however, that the ICANN response to the GAC's advice and proposals were insufficient. This was communicated in the GAC Chair's letter of 23 September 2010 to the ICANN Chair, with particular reference to the Trademark Clearing House (TC) and the Uniform Rapid Suspension System (URS), as follows:

The GAC notes with great concern that brand-owners continue to be faced with substantial and often prohibitive defensive registration costs which constitute a negative impact on their business planning and budgeting over which they have no control. Consultations by individual GAC members with business stakeholders underline how this issue remains a fundamental downside to the expansion of the gTLD space, far outweighing any perception of opportunities for innovation and customer-orientated benefits from the creation of corporate brand TLDs.

In the current financial and economic climate, these consultations reveal that many individual brands and businesses and media entities – some with large families of brands - find themselves without a sound business case to justify high levels of expenditure on large numbers of domain name registrations, most of which they are unlikely ever to use. Many of those that do decide to commit valuable financial resources for acquiring such defensive registrations will need to take some difficult decisions as to how to prioritise their efforts to avoid as much abuse of their trademarks as possible, in the knowledge that they will not be able to prevent all the potential abuse of their brands that the new gTLD round will facilitate.

This problem is exacerbated by lack of awareness: a recent survey carried out by 'World Trademark Review' showed that over 50% of respondents did not understand the implications for them of the gTLD programme.

The GAC remains of the view, therefore, that more concerted attention needs to be paid by ICANN to mitigate the costs to brandowners of new gTLDs arising from the need to acquire defensive registrations. The GAC urges ICANN therefore to reach out more effectively to the business community to set out both the opportunities for corporate business and the cost implications for brandholders of the expansion of the gTLD space.

The GAC notes the efforts to enhance through process the protection of rights owners as recounted in your letter of 5 August and developed in version 4 of the DAG.

In particular the GAC welcomes the expansion of the Trademark Clearing House to allow all nationally registered trademarks including those not substantially reviewed. However, the GAC shares the views of the World Intellectual Property Organisation (WIPO) that ICANN should ensure that the Trademark Clearing House operates on non-discriminatory terms and not impose a validation fee depending on the source of the trademark. The GAC also recommends that the match criteria

for searches be extended to include results that combine a trademark and a generic term (e.g. “Kopdakcameras”).

The GAC also urges ICANN to ensure that all new rights protection mechanisms complement the existing UDRP mechanism. The GAC has serious concerns with regard to the way in which the draft Uniform Rapid Suspension System which governments had supported has evolved so as to require a much higher burden of proof while limiting marks eligible for a URS claim to only those which have been subject to substantive review or validated in the Clearing House with the associated cost and time implications. As a result, the GAC believes that the aim of achieving a light-weight mechanism has been compromised with the successive drafting of the URS, to the extent that it no longer serves as a viable alternative for rightsholders to the UDRP in securing the timely suspension of domain names.

The ICANN Chair responded in his letter of 23 November to the GAC Chair as follows:

The Board understands the concerns expressed by the GAC regarding the potential costs of defensive registrations, and notes that the community spent a significant amount of time considering this issue, notably through the Implementation Recommendation Team and the Special Trademark Issues Working Group. The Board considered the many recommendations and supports the resulting protections now outlined in the Applicant Guidebook. These include:

- *The requirement for all new registries to offer a Trademark Claims service or a sunrise period at launch.*
- *The establishment of a Trademark Clearinghouse as a central repository for rights information, creating efficiencies for TM holders, registries, and registrars.*
- *The existing Uniform Domain Name Dispute Resolution Policy (UDRP) continues to be available where complainant seeks transfer of names. Compliance with UDRP decisions is required in all new, as well as existing, gTLDs.*
- *Implementation of a Uniform Rapid Suspension (URS) system that provides a streamlined, lower-cost mechanism to suspend infringing names.*
- *The requirement for all new gTLD operators to provide access to “thick” Whois data. This access to registration data aids those seeking responsible parties as part of rights enforcement activities.*

Following further individual GAC member national consultations with domestic rights protection agencies and stakeholders, and due consideration of

a) the ICANN Chair’s letter of 23 November 2010;

b) the non-adoption in the “final” version of the DAG of the GAC’s proposals for the TC and the URS contained in the GAC Chair’s letter of 23 September 2010;

- c) the briefing the GAC received in Cartagena from ICANN staff on the changes incorporated in the “final” version of the DAG;
- and d) the GAC’s discussions in Cartagena with the GNSO;

at its meeting with the ICANN Board in Cartagena the GAC expressed that it continued to have fundamental concerns about the inadequacy of the proposed rights protection mechanisms.

Furthermore, the Cartagena communiqué stated that

as a result of the GAC's exchange with the GNSO, the GAC is also mindful that major stakeholder groups within ICANN (such as the Business and Intellectual Property constituencies) do not believe the most recent version of the DAG reflects their advice and concerns.

2. Root Zone Scaling

1. Introduction

This scorecard summarizes the GAC’s remaining concerns that ICANN provide sufficient safeguards so that the expected scale and rate of change of introduction of new gTLDs will not have a negative impact on the security, stability and resilience of the DNS.

References are made to ICANN Chair’s letter to the GAC Chair of 23 November 2010 in response of the letter of 10th March 2010 from the GAC Chair (‘ICANN’s response’) and to and to the Draft Applicants Guidebook version 4 (‘DAG4’)

2. Root growth control and monitoring / early warning system

In ICANN’s response reference is made to the intention (DAG4) to delegate 200 to 300 TLDs annually, and that in no case more than 1000 new gTLDs be added to the root zone in a year.

The GAC understands that the robustness of the root server system and the way it will react following substantive additions can only be fully understood by the practice and experience of the first round. Therefore the establishment of a monitoring system, as recommended by the community and taken on board by ICANN, is fully supported by the GAC. According to ICANN’s response “(it will) ensure that changes relating to scaling of the root management systems don’t go unnoticed prior to those changes becoming an

issue” This addresses the GAC’s advice that there should be a control mechanism to allow for the mitigation of any strain or unwanted effects of a large scale introduction of new TLDs.

However, the GAC believes that the implications and processes needed to act upon the outcome of such an early warning system need to be elaborated further in the Applicant Guidebook. The GAC accordingly now tables the following questions and proposals for the Board’s consideration:

1. What will be the modus operandi when the system issues a warning that the introduction should slow down or even stopped?
2. There should be scenarios and system responses clearly set out so that ICANN reacts predictably and quickly when there are indicators that new additions and changes are straining the root zone system. The level of detriment should be graded and described, with the resulting restorative measures outlined. These would include stopping further additions for defined periods, more intensive monitoring and in extreme cases suspension of new gTLDs.
3. Such scenarios should be described in the Applicants Guidebook with detailed explanations of how applicants will be informed about potential slowing down or even stopping of their application If the situations are defined and documented then applicants should also be advised of the consequences in certain cases.

The GAC recommends that the control mechanism should be carefully designed and there should be clearly understood (policy) implications reflected in the Applicant Guidebook before ICANN launches the round to open up the gTLD space. In view of the widely acknowledged unpredictability of all the effects of a massive introduction of gTLDs in the root zone system, the GAC also believes that there should be an in depth evaluation of the impacts of the first introduction round on the root zone system followed by a public comment period before a decision is taken to start the second round. The monitoring system for this purpose should therefore be fully operational from the start of the first round in order to deliver the necessary relevant data before the second round starts.

Therefore the GAC requests the Board,

4. to continue implementing a monitoring system and ensure that the processes that flow from its results are fully described in the Application Guidebook before the start of the first application round;
5. not to launch a second round of applications (1) unless there are indications from monitoring the root system that the first round did not in any way jeopardize the security and stability of the root zone system.

¹ assuming the first one does not exceed 200- 300 application

3. Operational and resource issues to avoid root change congestion and maintain continued integration of the system

The GAC expressed on several occasions its concern that the root change processes could face congestion at the operational level. ICANN's response made clear that the scaling effects can be absorbed by the root zone operators but that these effects are much more likely to be felt within the context of ICANN's internal systems, such as application processing, legal review, IANA process, etc. Therefore the GAC remains concerned as to whether both ICANN's internal systems and the resources of external actors can scale up sufficiently to meet the demands in order to process 200 to 300 applications a year.

The GAC accordingly now tables the following questions for the Board's consideration:

1. How will the necessary increase in resources be accomplished, is there flexibility to deal with changing demands, and how will ICANN avoid the possibility that other activities will be impacted by the possible diversion of resources to processing new gTLD applications?
2. How will ICANN address the specific needs of applicants from different, perhaps non-English speaking cultures, and with different legal environments?
3. How quickly would ICANN expect to complete contract negotiations for new gTLDs in a potential situation of 200 to 300 simultaneous applications and evaluations?
4. Are all the external actors (IANA, USG, root server operators, etc) sufficiently informed about what is expected from them in terms of work loadings and resources in order to fulfill their respective roles, in particular the pre-delegation checking, approvals, and implementation of potentially 200 to 300 root zone changes a year?
5. Following delegation of so many additional TLDs, what is ICANN's projection for the administrative workload for ICANN and IANA for processing requests for changes and additions to TLDs once they have been established in the root? What is ICANN's plan for resourcing these day-to-day operational functions, including staff requirements?

3. Geographic Names: Analysis of GAC's DAG4 comments and ICANN's answers

a) The GAC underlines that country and territory names should be excluded from applications until the ccPDP.

The Board will not consider such applications in the first round.

- The GAC reiterates its understanding that the IDN ccPDP and the use of country and territory names are related. Therefore the question, whether country and territory names need to be excluded has to be reconsidered before the next application round.

The GAC notes that ICANN considers that the use of country and territory names in general is out of scope of the IDN ccPDP, and therefore linking the two processes does not appear appropriate. ICANN therefore suggests that it is a possibility that the use of country and territory names may be considered after the first round of gTLD applications. Modalities for subsequent rounds will be determined by ICANN based on recommendations from the ICANN community and GAC Advice. It is important that GAC restates advice on this issue; see Annex B to Nairobi Communiqué. The GAC's main point was that strings that are a meaningful representation or abbreviation of a country or territory name should be treated outside the gTLD process. If they should be considered as new TLDs, they should be handled through a policy development process in ccNSO.

b) GAC reiterated its concern about insufficient protection of geographic names.

The Board does not refer to this concern.

For the GAC appropriate and free objection procedures would be acceptable to provide the protection of geographic names (see also c and e).

4. GAC's position on "Definition of geographic names"

The public comment period allows free of charge comments on every applied for string. Individual governments as the entire GAC can inform ICANN, which strings they consider to be geographic names. ICANN commits to process applications for strings that governments consider to be geographic names only if the respective government does support or not object to the use of that string.

GAC recalls that in cases in which geographic names correspond with generic names or brands, such a regulation would not exclude per se the use of generic names and brands as Top-Level Domains. It would, however, be in the area of responsibility of the adequate government to define requirements and safeguards to prevent the use of those Top-Level Domains as geoTLDs.

5. Providing opportunity for all stakeholders including those from developing countries

SUMMARY TABLE

A. GAC & ICANN Board Positions

No.	Issue Topic	GAC Position	ICANN Board Position	Remarks
1.	Recommendations of the Joint AC/SO Working Group	Supported	Supported	Board encouraged to adopt the recommendations
2.	Support on Technical operations and other requirements	ICANN to set technical and other requirements, including cost considerations, at a reasonable and proportionate level in order not to exclude developing country stakeholders from participating in the new gTLD-process	<ul style="list-style-type: none"> • New gTLD process is developed on a cost recovery model • Experience gained from first round will inform decisions on fee levels, and the scope for discounts and subsidies in subsequent rounds • Non-financial means of support are being made available to deserving cases. 	
3.	Concerns from the Internet Government Forum (IGF), Vilnius, Lithuania	Letter from GAC to ICANN 23 rd September 2010. The GAC reiterates its strong belief that the new gTLD process should meet the global public interest in promoting a fully inclusive and diverse Internet community and infrastructure, consistent with the Affirmation of Commitments. The GAC therefore urges ICANN to set		

No.	Issue Topic	GAC Position	ICANN Board Position	Remarks
		<p>technical and other requirements, including cost considerations, at a reasonable and proportionate level in order not to exclude stakeholders from developing countries from participating in the new gTLD process. Key documents produced by ICANN must be available in all UN languages within a reasonable period in advance of the launch of the gTLD round. The GAC strongly recommends that the communications strategy for the new gTLD round be developed with this issue of inclusiveness as a key priority.</p>		

B. Developing Countries/Communities Position.

No.	Issue Topic	Community Position	Joint SO/AC working Group Recommendation.	ICANN Board Position	Remarks
1.	Roll out of new gTLD's and IDN's.	Rolling out new gTLD's and IDNs was done in a hurry without basis on a careful feasibility study on the impact that this rollout will have on developing countries		The position of ICANN is that in no way this is a massive roll out and in fact there have been only 900 applications for new gTLD for a year and only 200 of them will be reviewed. ICANN holds the position that it has been fair and inclusive in its decision and that also it will help any country in this process	
2.	Eligibility for support	Developing communities strongly believe that entrepreneur applicants from developing countries, where the market is not wide enough for a reasonable profit making industry, are eligible for support. The African Community believe: • Entrepreneur applicants from African countries are	Who should receive Support? • Governments, Municipal and local authorities from developing countries • Non-governmental Organizations (NGOs), civil society and not-for-profit organizations • Limited Community	ICANN board is considering the proposals from the SO/AC joint working group.	

No.	Issue Topic	Community Position	Joint SO/AC working Group Recommendation.	ICANN Board Position	Remarks
		<p>eligible for support.</p> <ul style="list-style-type: none"> • Deem that Civil society, NGOs and non for profit organizations in Africa are the most in need of such support, • Believe that support is of utmost importance for geographic, cultural linguistic, and more generally community based applications. • Support to new gTLD applicants in Africa be prioritized • Support to be provided to applicants of new gTLDs in Africa should include, financial, linguistic, legal and technical • Proposed cost reduction: • Proposed that the reduced cost be paid incrementally, • Applications to be according to the 	<p>based applications such as cultural, linguistic and ethnic</p> <ul style="list-style-type: none"> • Applications in languages whose presence on the web is limited • Local entrepreneurs, in those markets where market constraints make normal business operations more difficult • Applicants located in emerging economies <p>Type of support</p> <ul style="list-style-type: none"> • Cost Reduction Support • Sponsorship and other funding support • Modifications to the financial continued operation instrument obligation • Technical support • Logistical support • Obligation Technical 		

No.	Issue Topic	Community Position	Joint SO/AC working Group Recommendation.	ICANN Board Position	Remarks
		<p>appropriate business models.</p> <ul style="list-style-type: none"> • Supplementary support and additional cost reduction for gTLDs applications from African countries. 	<p>support for applicants in operating or qualifying to operate a gTLD</p> <ul style="list-style-type: none"> • gTLDs Exception to the rules requiring separation of the Registry and Registrar function 		

**CONTENTION SET ON HOLD
PENDING ACCOUNTABILITY MECHANISM**

The International Rugby Board prevailed in each Community Objection against 1-1612-2805 [RUGBY], Atomic Cross, LLC and 1-1206-66762 [RUGBY], dot Rugby Limited. These objection determinations remove string contention.

RUGBY
1-994-63638
IRB Strategic Developments Limited

Will Not Proceed
Community Objection Determination


RUGBY
1-1612-2805
Atomic Cross, LLC

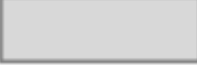
Will Not Proceed
Community Objection Determination

RUGBY
1-1206-66762
dot Rugby Limited

Direct 

Indirect 

Application has prevailed and is no longer in contention 

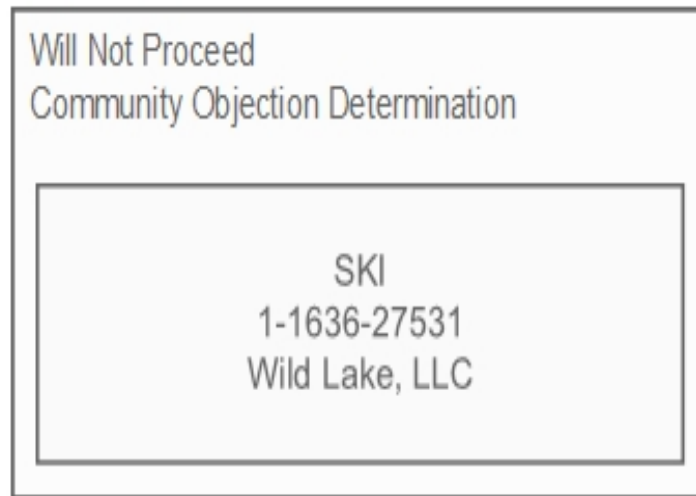
Application remains in contention set 

Application will not proceed 

**CONTENTION SET ON HOLD
PENDING ACCOUNTABILITY MECHANISM**

The Fédération Internationale de Ski (FIS) prevailed in the Community Objection against 1-1636-27531 [SKI], Wild Lake, LLC.

This objection determination removes string contention.



Direct

Indirect

Application has prevailed and is no longer in contention

Application remains in contention set

Application will not proceed

**CONTENTION SET ON HOLD
PENDING ACCOUNTABILITY MECHANISM**

1-1012-71460 [SPORT], SportAccord prevailed in String Confusion Objection against 1-1614-27785 [SPORTS], Steel Edge, LLC.

This objection determination created direct contention between

1-1012-71460 [SPORT], SportAccord and 1-1614-27785 [SPORTS], Steel Edge, LLC.

However, 1-1012-71460 [SPORT], SportAccord prevailed in each Community Objection against 1-1614-27785 [SPORTS], Steel Edge, LLC and 1-1174-59954 [SPORT], dot Sport Limited.

These objection determinations remove string contention.

Will Not Proceed
Community Objection Determination

SPORTS
1-1614-27785
Steel Edge, LLC


SPORT
1-1012-71460
SportAccord

Will Not Proceed
Community Objection Determination


SPORT
1-1174-59954
dot Sport Limited

Direct 

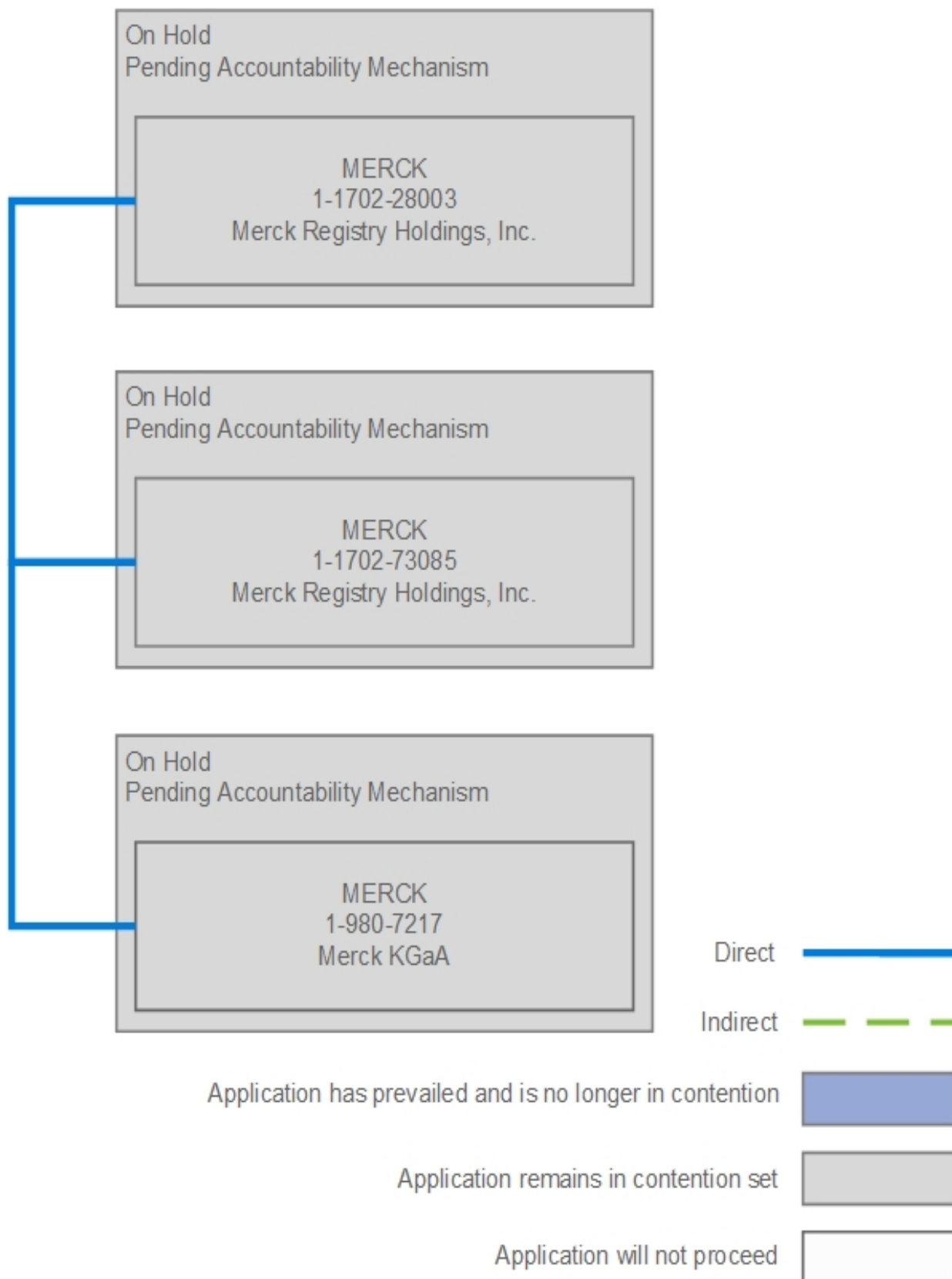
Indirect 

Application has prevailed and is no longer in contention 

Application remains in contention set 

Application will not proceed 

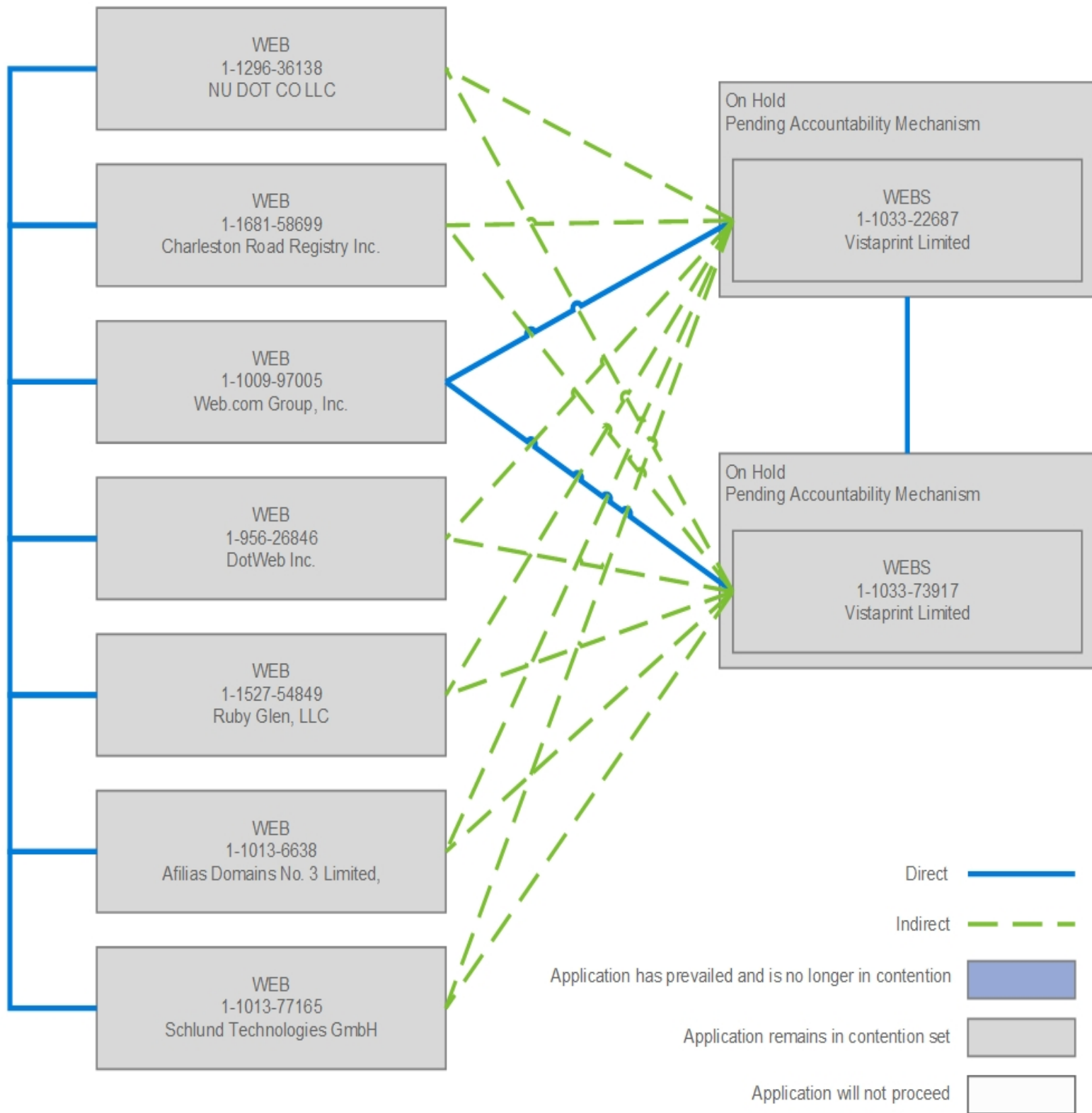
**CONTENTION SET ON HOLD
PENDING ACCOUNTABILITY MECHANISM**



**CONTENTION SET ON HOLD
PENDING ACCOUNTABILITY MECHANISM**

1-1009-97005 [WEB], Web.com Group, Inc prevailed in each String Confusion Objection against
1-1033-22687 [WEBS], Vistaprint Limited and 1-1033-73917 [WEBS], Vistaprint Limited.

These objection determinations create direct string contention among
1-1009-97005 [WEB], Web.com Group, Inc; 1-1033-22687 [WEBS], Vistaprint Limited; and 1-1033-73917 [WEBS], Vistaprint Limited.



INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)
A Division of the American Arbitration Association (AAA)
CASE # 50 117 T 1083 13

In the matter of an Independent Review Process pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process*

Between: DotConnectAfrica (DCA) Trust;
("Claimant")

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at Contact Information Redacted
Contact Information Redacted

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent")

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located Contact Information Redacted
Contact Information Redacted

Claimant and Respondent will together be referred to as "Parties".

DECISION ON INTERIM MEASURES OF PROTECTION

Babak Barin, *Chair*
Prof. Catherine Kessedjian
Hon. Richard C. Neal (Ret.)

12 May 2014

BACKGROUND

1. DotConnectAfrica (“DCA”) Trust (“Claimant”), is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya. DCA was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and for the public good.
2. In March 2012, DCA Trust applied to the Internet Corporation for Assigned Names and Numbers (“ICANN”) for the delegation of the .Africa top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), an internet resource available for delegation under that program.
3. ICANN (“Respondent”) is a non-profit corporation established under the laws of the State of California, U.S.A., on 30 September 1998 and headquartered in Marina del Rey, California. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions, and local law.
4. On 4 June 2013, the ICANN Board New gTLD Program Committee (“NGPC”) posted a notice that it had decided not to accept DCA’s application.
5. On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), which denied the request on 1 August 2013.
6. On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN’s Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process (“CEP”) to try and resolve the issues relating to DCA Trust’s application. Despite several meetings, however, no resolution was reached.
7. On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3, of ICANN’s Bylaws.

INDEPENDENT REVIEW PROCESS

8. According to DCA Trust, the central dispute between it and ICANN in the Independent Review Process invoked by DCA Trust in October 2013 and

described in its Amended Notice of Independent Review Process submitted to ICANN on 10 January 2014 arises out of:

“(1) ICANN’s breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”); and (2) ICANN’s wrongful decision that DCA’s application for .AFRICA should not proceed [...]”¹

9. According to DCA Trust, “ICANN’s administration of the New gTLD Program and its decision on DCA’S application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN’s Articles of Incorporation and Bylaws.”² DCA Trust also advanced that “ICANN’s violations materially affected DCA’s right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program.”³
10. In its Response to Claimant’s Amended Notice submitted to DCA Trust on 10 February 2014⁴, ICANN submitted that in these proceedings, “DCA challenges the 4 June 2013 decision of the ICANN Board New gTLD Program Committee (“NGPC”), which has delegated authority from the ICANN Board to make decisions regarding the New gTLD. In that decision, the NGPC unanimously accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that DCA application for .AFRICA should not proceed. DCA argues that the NGPC should not have accepted the GAC’s advice. DCA also argues that ICANN’s subsequent decision to reject DCA’s Request for Reconsideration was improper.”⁵
11. ICANN argued that the challenged decisions of ICANN’s Board “were well within the Board’s discretion” and the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Applicant Guidebook (“Guidebook”) that the Board adopted for implementing the New gTLD Program.”⁶
12. Specifically, ICANN also advanced that “ICANN properly investigated and rejected DCA’s assertion that two of ICANN’s Board members had conflicts of interest with regard to the .AFRICA applications, [...] numerous African

¹ Claimant’s Amended Notice of Independent Review Process, *para.* 2.

² *Ibid.*

³ *Ibid.*

⁴ ICANN’s Response to Claimant’s Amended Notice contains a typographical error, it is dated “February 10, 2013” rather than 2014.

⁵ ICANN’s Response to Claimant’s Amended Notice, *para.* 4

⁶ *Ibid. para.* 5

countries issued “warnings” to ICANN regarding DCA’s application, a signal from those governments that they had serious concerns regarding DCA’s application; following the issuance of those warnings, the GAC issued “consensus advice” against DCA’s application; ICANN then accepted the GAC’s advice, which was entirely consistent with ICANN’s Bylaws and the Guidebook; [and] ICANN properly denied DCA’s Request for Reconsideration.”⁷

13. In short, ICANN argued that in these proceedings, “the evidence establishes that the process worked exactly as it was supposed to work.”⁸

REQUEST FOR INTERIM MEASURES OF PROTECTION

14. In an effort to safeguard its rights pending the ongoing constitution of the IRP Panel, on 22 January 2014, DCA Trust wrote to ICANN requesting that it immediately cease any further processing of all applications for the delegation of the .AFRICA gTLD, failing which DCA Trust would seek emergency relief under Article 37 of the ICDR Rules. In addition, DCA Trust indicated that it believed it had the right to seek such relief because there is no standing panel (as anticipated in the Supplementary Procedures for ICANN Independent Review Process), which would otherwise hear requests for emergency relief.

15. In response, in an email dated 5 February 2014, ICANN wrote:

“Although ICANN typically is refraining from further processing activities in conjunction with pending gTLD applications where a competing applicant has a pending reconsideration request, ICANN does not intend to refrain from further processing of applications that relate in some way to pending independent review proceedings. In this particular instance, ICANN believes that the grounds for DCA’s IRP are exceedingly weak, and that the decision to refrain from the further processing of other applications on the basis of the pending IRP would be unfair to others.”⁹

16. In its Request for Emergency Arbitrator and Interim Measures of Protection subsequently submitted to ICANN on 28 March 2014, DCA Trust argued, *inter alia*, that, “in an effort to preserve its rights, in January 2014, DCA requested that ICANN suspend its processing of applications for .AFRICA during the pendency of this proceeding. ICANN, however, summarily refused to do so.”¹⁰

⁷ *Ibid.*

⁸ *Ibid. para. 6*

⁹ ICANN counsel’s email to DCA Trust counsel dated 5 February 2014.

¹⁰ Request for Emergency Arbitrator and Interim Measures of Protection, *para. 3*

17. DCA Trust also argued that “on 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA’s competitor (a South African company called ZACR) on 26 March 2014 in Beijing [...] Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZACR in light of the fact that this proceeding was still pending. Instead, according to ICANN’s website, ICANN *signed its agreement with ZACR the very next day, two days ahead of plan, on 24 March instead of 26 March.*”¹¹
18. According to DCA Trust, that same day, “ICANN then responded to DCA’s request by presenting the execution of the contract as a *fait accompli*, arguing that DCA should have sought to stop ICANN from proceeding with ZACR’s application, as ICANN had already informed DCA of its intention [to] ignore its obligations to participate in this proceeding in good faith.”¹² DCA Trust also argued that on 25 March 2014, as per ICANN’s email to the ICDR, “ICANN for the first time informed DCA that it would accept the application of Article 37 [of the ICDR International Dispute Resolution Procedures, amended and effective June 1, 2009 (“ICDR Rules”)] to this proceeding contrary to the express provisions of the Supplementary Procedures of ICANN has put in place for the IRP Process.”¹³
19. In its Request, DCA Trust argued that it “is entitled to an accountability proceeding with legitimacy and integrity, with the capacity to provide a meaningful remedy. [...] DCA has requested the opportunity to compete for rights to .AFRICA pursuant to the rules that ICANN put into place. Allowing ICANN to delegate .AFRICA to DCA’s only competitor – which took actions that were instrumental in the process leading to ICANN’s decision to reject DCA’s application – would eviscerate the very purpose of this proceeding and deprive DCA of its rights under ICANN’s own constitutive instruments and international law.”¹⁴
20. Finally, DCA Trust requested, among other things, the following interim relief:
- a. An order compelling *ICANN to refrain from any further steps toward delegation of the .AFRICA gTLD*, including but not limited to execution or assessment of pre-delegation testing, negotiations or discussions relating to delegation with the entity ZACR or any of its officers or agents; [...]¹⁵

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, para. 4.

¹⁴ *Ibid.*, para. 5.

¹⁵ *Ibid.*, para. 6.

21. In its Response to DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection submitted on 4 April 2014, ICANN urged that DCA's request for a stay be denied. ICANN also reproached DCA for having waited five months before initiating its Request for Interim Measures of Protection pursuant to Article 37 of the ICDR Rules.
22. ICANN further argued that Claimant's Request for Interim Relief ought to be denied because "DCA has not demonstrated a reasonable possibility that it will succeed on the merits of this IRP, which the law requires DCA to demonstrate."¹⁶
23. According to ICANN, "DCA's decision to wait five months before seeking a stay reflects the weakness of DCA's claims and the lack of any corresponding irreparable harm to DCA. This is compounded by the fact that DCA has done nothing to try to expedite these proceedings. To the contrary, DCA has failed to file its fees timely, it sought multiple extensions of time to file its papers, and it requested a very leisurely amount of time for the parties to select the IRP Panel. ICANN, and not the DCA, has been the party trying to expedite these proceedings, and DCA has resisted at every turn."¹⁷
24. DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection, initially scheduled for a hearing on 14 April 2014 before an emergency arbitrator pursuant to ICDR Rules 21 and 37, was instead referred to this Panel on 13 April 2014 for review and consideration pursuant to Article 37.6 of the ICDR Rules.
25. On 22 April 2014, this Panel held an organizational telephone conference call with the Parties. During that call, it was agreed, among other things, that the telephone hearing for DCA's Request for Interim Measures of Protection will be heard on 5 May 2014, and that ICANN would not take any further steps that would in any way prevent this Panel from granting the full relief requested by DCA Trust in its Request. These and a number of directions given by the Panel to the Parties were reflected in a Procedural Order No. 1 issued on 24 April 2014.
26. On 5 May 2014 this Panel heard the Parties' submissions on their respective written submissions and the Panel's questions sent to them in advance on 2 May 2014.

¹⁶ ICANN's Response to Claimant's Request for Emergency Arbitrator and Interim Measures of Protection, *para.* 3.

¹⁷ *Ibid.*, *para.* 30.

DECISION AND REASONS OF THE IRP PANEL

27. After having carefully read DCA Trust's written submissions and the responses filed by ICANN, and after listening to the Parties' respective oral presentations made by telephone on 5 May 2014, for reasons set forth below, the Panel is unanimously of the view that a stay ruling in the form described below is in order in this proceeding and that ICANN must immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust's Notice of Independent Review Process and issued its final decision regarding the same.
28. The Panel finds that interim relief in this proceeding is warranted based on two independent and equally sufficient grounds.
29. First, the Panel is of the view that this Independent Review Process could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel as follows:
- "There shall be an omnibus standing panel between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected."
30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an Independent Review Process as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.
31. In the Panel's unanimous view, therefore, a stay order in this proceeding is proper to preserve DCA Trust's right to a fair hearing and a decision by this Panel before ICANN takes any further steps that could potentially moot DCA Trust's request for an independent review. This is the same opportunity DCA would have enjoyed without a stay, but for ICANN's failure to create the standing panel.
32. Whether the Panel's decision is advisory only, as ICANN contends, or binding, as DCA Trust argues, the Panel is strongly of the view that ICANN's unique, international and important public functions require it to scrupulously honor the procedural protections its Bylaws, rules and regulations purport to offer the internet community. ICANN has been entrusted with the important

responsibility of bringing order to the global internet system. As set out in Article I, Sections 1 and 2 of ICANN's Bylaws:

“[t]he mission of ICANN is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. [...] In performing its mission, the following core values should guide the decisions and actions of ICANN:

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

[...]

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

33. In the Panel's unanimous view, it would be unfair and unjust to deny DCA Trust's request for interim relief when the need for such a relief by DCA Trust arises out of ICANN's failure to follow its own Bylaws and procedures.
34. Second, interim relief in this case is independently warranted for reasons unrelated to ICANN's role in creating the need for such relief as explained above.
35. DCA Trust argues that four criteria must be satisfied before interim relief is granted under international law and in international proceedings: urgency, necessity, protection of an existing right, and existence of a *prima facie* case on the merits, without the necessity of prejudging the matter.
36. ICANN agrees with the first three criteria identified by DCA Trust, but disagrees with the fourth. For ICANN, the Panel needs to find more than a *prima facie* case on the merits before ordering interim relief in this proceeding. In its Response to DCA Trust's Request for Emergency Arbitrator and Interim Measures of Protection, ICANN submits that the standard must be the one set out in article 17(A)(1)(b) of the UNCITRAL *Model Law on International Commercial Arbitration*. ICANN explains:

“In fact, it is generally accepted under both international and U.S. law that, in order to demonstrate entitlement to interim relief, the party seeking relief must also demonstrate a reasonable possibility of success on the merits. For example, Article 27 [*sic.*] (A)(1)(b) of the United Nations Commission on International Trade Law's (“UNCITRAL's”) *Model Law on International Commercial Arbitration* states that a party requesting an interim measure must demonstrate

that “there is a reasonable possibility that the requesting party will succeed on the merits of the claim.” [...] Likewise, under U.S. law, a party seeking a preliminary injunction must at least demonstrate that “the likelihood of success is such that serious questions going to the merits were raised.”¹⁸

37. The Panel agrees with the Parties that the four criteria listed above in paragraph 35 form a part of the criteria most commonly used by international and national courts and arbitral tribunals¹⁹ to evaluate a party’s request for interim relief. The Panel, however, does not see a distinction between the demonstration of “a prima facie case” or “a reasonable possibility that the requesting party will succeed on the merits of the claim”. Like the International Law Association (“ILA”), the Panel is of the view that the demonstration of “a prima facie case” and “a reasonable possibility that the requesting party will succeed on the merits of the claim” are in reality one and the same standard.
38. Indeed, as the ILA recommended in its resolution of 1996²⁰, the granting of an interim relief should be available “on a showing of a case on the merits on a standard of proof which is less than that required for the merits under the applicable law”.

Urgency

39. Both DCA Trust and ICANN agree that urgency is one of the criteria that this Panel must consider before it decides to grant interim relief. DCA Trust in particular argues that the orders it requests are needed urgently, because:

“[w]ithout the order compelling ICANN to stay processing of ZACR’s application, DCA will suffer irreparable harm before the IRP process can be concluded... A request for interim measures of protection is considered urgent, if absent the requested measure, an action that is prejudicial to the rights of either party is likely to be taken before such final decision is given. This standard is sometimes termed “imminent harm”. In light of ICANN’s response to DCA’S request that it refrain from signing a Registry Agreement with ZACR – namely, signing the agreement 48 hours ahead of time in order to prevent any effective intervention by DCA – the additional harm DCA seeks to prevent clearly is imminent. Moreover, ZACR claims that it will have received

¹⁸*Ibid.*, para. 21.

¹⁹ By “most commonly used”, the Panel means that this standard is used by international or regional courts and tribunals, but also by many domestic courts under their own laws.

²⁰ ILA Report of the Sixty-Seventh Conference, Helsinki, 1996, p. 202.

all rights to .AFRICA by April 2014, and will begin operating .AFRICA by May 2014.”²¹

40. The Panel is satisfied that the urgency test is met in the present case. Indeed, DCA Trust argues, without being contradicted by ICANN, that in March 2014 the latter officially signed the registry agreement for the .Africa gTLD with ZACR, DCA Trust’s competitor.
41. The urgency test is met as well when the Panel takes into consideration, ICANN’s noncommittal email to it and DCA Trust of 23 April 2014, in which ICANN writes:

“I am writing to follow up...with respect to the timing of the ultimate delegation by ICANN to ZA Central Registry of .AFRICA into the root zone...ICANN will not, as a practical matter, be able to conclude the delegation process prior to 15 May 2014. As a result, the schedule adopted by the Panel...would give ICANN the opportunity to consider the Panel’s recommendation in the event the Panel recommends a stay.” [Emphasis added]

42. The registry agreement being signed, the countdown for the launch of the .Africa gTLD could commence. ZACR announces on its website (<https://www.registry.net.za/launch.php>) that the launch should take place in June 2014. This Panel, even if it works very rapidly, will not be in a position to decide on the merits of DCA’s Request for an Independent Review before June 2014. Therefore, there is absolutely no doubt in the Panel’s mind that DCA Trust’s need for interim relief in this matter is urgent.

Necessity

43. Both DCA Trust and ICANN agree that a test of necessity must be met before granting the requested interim relief. Indeed, in its Response to Claimant’s Request for Emergency Arbitrator and Interim Measures of Protection, ICANN writes:

“As DCA acknowledges in its Request, in order to show necessity under international law, it must demonstrate proportionality, *i.e.* that the harm it would occur in the absence of interim relief measures would “exceed [] greatly the damage caused to the party affected” by these measures. DCA contends that it would suffer serious harm in the absence of interim relief because the “operation of .AFRICA is a unique right” and “DCA was created expressly for the purpose of campaigning for, competing for and ultimately operating .AFRICA.” But DCA fails to acknowledge that, whatever its unilateral plans might have been, its

²¹ Request for Emergency Arbitrator and Interim Measures of Protection, *para.* 30.

actual probability of harm is greatly diminished by its scant probability of success on the merits. DCA also fails to note the substantial potential harm that ZACR could suffer if the processing of its application for, and the ultimate delegation of, .AFRICA is delayed.”

“ICANN’S decision to proceed with the processing of ZACR’s application for .AFRICA despite DCA’s pending IRP is a reflection of ICANN’s belief that: (i) DCA’s IRP is frivolous and unlikely to succeed on the merits; and (ii) ZACR potentially could suffer substantial harm if the delegation of .AFRICA to it is further delayed.”²²

44. The Panel is of the opinion that the necessity test requires the Panel to consider the proportionality of the relief requested. The Panel thus must balance the harm caused to DCA Trust if a stay is not granted and the harm that would be caused to ICANN if interim relief were to be ordered. As explained by DCA Trust:

“If [DCA Trust] is deprived of the opportunity even to compete to operate .AFRICA, DCA will be unable to accomplish its charitable aims and will be unable to perform its mandate [...] By contrast, ICANN will suffer no similar harm...Regardless of the outcome of the IRP, ICANN will be able to delegate .AFRICA. [Similarly, ZACR may receive the rights to “AFRICA even if DCA is permitted to compete with it pursuant to ICANN’s rules and procedures for the new gTLD program.] The IRP is meant to be an expedited dispute resolution process. A slight delay in delegation is hardly an undue burden compared to the issues at stake.”²³

45. It is abundantly clear to the Panel from the facts as explained by both Parties in this case that if a stay is not granted and the registry agreement between ICANN and ZACR is implemented further, the chances of DCA Trust having its Request for an independent review heard and properly considered will be jeopardized.
46. The Panel considers that a stay in the implementation of the registry agreement between ICANN and ZACR is therefore proportionate and adequate to the particular circumstances of this case. Indeed, neither ICANN, nor ZACR will suffer from a few more months of delay if a stay of processing of ZACR’s .AFRICA application is ordered. Indeed, neither ICANN nor ZACR has pointed to any specific prejudice or harm that it will suffer if DCA Trust’s request for interim relief is granted. The same cannot be said about the

²² ICANN’s Response to Claimant’s Request for Emergency Arbitrator and Interim Measures of Protection, *paras.* 25 and 26.

²³ Request for Emergency Arbitrator and Interim Measures of Protection, *paras.* 27 and 29.

absence of such a relief for DCA Trust, which clearly would suffer irreparable harm if interim relief is not granted.

Protection of an existing right

47. DCA Trust has demonstrated, to the satisfaction of this Panel that, beyond the procedural rights it must enjoy to have its case heard, DCA Trust also enjoys, according to ICANN's own Bylaws, the right to have ICANN's Board decision reviewed by an independent panel, a right which will be lost if interim relief is not granted in this case. Indeed, Article IV, Section 3, paragraph 1 of ICANN's Bylaws unequivocally indicates that:

"In addition to the reconsideration process described in Section 2 of this Article, 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." [Emphasis added]

Consequently, the Panel has determined that this criterion for the granting of interim relief in this case has also been met.

A reasonable possibility that the requesting party will succeed on the merits

48. This criterion was most heavily debated between the Parties. ICANN argues that DCA Trust does not have a case on the merits. In fact, ICANN goes as far as saying that Claimant's Request for an Independent Review Process is frivolous. Therefore, ICANN argues that DCA Trust has not demonstrated that there is a reasonable possibility it would succeed on the merits. In the Panel's view, by doing so, ICANN is asking for more than is required of DCA Trust at this stage of the independent review process.
49. Contrary to ICANN'S submissions, the Panel is of the view that it need not, at this stage, make a full appraisal of the merits of DCA Trust's case, given that the standard of proof for interim relief is lower than the standard of proof required for the evaluation of the merits of the case²⁴.
50. Having carefully examined the written submissions of the Parties, heard their oral submissions by telephone and deliberated on the various issues raised by them to date, the Panel is of the view that DCA Trust's case must proceed to the next stage.

²⁴ See the report accompanying the ILA resolution of 1996 mentioned in footnote 2. On page 195, the report says that the "standard of proof propounded (...) was one which found wide acceptance" among all the countries studied, except one.

DECISION OF THE IRP PANEL

51. The Panel therefore concludes that ICANN must immediately refrain from any further processing of any application for .AFRICA until this Panel has heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same.

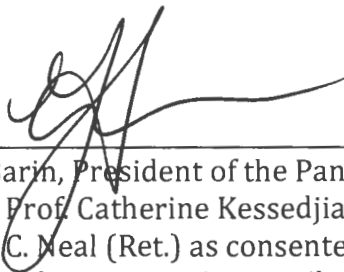
52. The Panel reserves its views with respect to the other requests for relief made by DCA Trust in its Request for Emergency Arbitrator and Interim Measures of Protection. The Panel will consider the Parties' respective arguments in that regard if and when required by the Parties and if appropriate.

53. The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the hearing of the merits.

This Decision on Interim Measures of Protection has thirteen (13) pages. The members of the Panel have all reviewed this decision and agreed that the Chair may sign it alone on their behalf.

Signed in Montreal, Quebec for delivery to the Parties in Los Angeles, California.

Dated 12 May 2014.



Babak Barin, President of the Panel, on behalf of himself, Prof. Catherine Kessedjian and the Hon. Richard C. Neal (Ret.) as consented to by the Parties in their respective emails to the Panel of 7 May 2014

Responsibility of States for Internationally Wrongful Acts 2001

Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2001*, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.



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.

CORPORATIONS CODE

SECTION 5140-5142

5140. Subject to any limitations contained in the articles or bylaws and to compliance with other provisions of this division and any other applicable laws, a corporation, in carrying out its activities, shall have all of the powers of a natural person, including, without limitation, the power to:

(a) Adopt, use, and at will alter a corporate seal, but failure to affix a seal does not affect the validity of any instrument.

(b) Adopt, amend, and repeal bylaws.

(c) Qualify to conduct its activities in any other state, territory, dependency, or foreign country.

(d) Issue, purchase, redeem, receive, take or otherwise acquire, own, sell, lend, exchange, transfer or otherwise dispose of, pledge, use, and otherwise deal in and with its own bonds, debentures, notes, and debt securities.

(e) Issue memberships.

(f) Pay pensions, and establish and carry out pension, deferred compensation, saving, thrift and other retirement, incentive and benefit plans, trusts, and provisions for any or all of its directors, officers, employees, and persons providing services to it or any of its subsidiary or related or associated corporations, and to indemnify and purchase and maintain insurance on behalf of any fiduciary of such plans, trusts, or provisions.

(g) Levy dues, assessments, and admission fees.

(h) Make donations for the public welfare or for community funds, hospital, charitable, educational, scientific, civic, religious, or similar purposes.

(i) Assume obligations, enter into contracts, including contracts of guarantee or suretyship, incur liabilities, borrow or lend money or otherwise use its credit, and secure any of its obligations, contracts or liabilities by mortgage, pledge or other encumbrance of all or any part of its property and income.

(j) Participate with others in any partnership, joint venture or other association, transaction or arrangement of any kind whether or not such participation involves sharing or delegation of control with or to others.

(k) Act as trustee under any trust incidental to the principal objects of the corporation, and receive, hold, administer, exchange, and expend funds and property subject to such trust.

(l) Carry on a business at a profit and apply any profit that results from the business activity to any activity in which it may lawfully engage.

(m) Pay the reasonable value of services rendered in this state to the corporation before January 1, 1975, and not previously paid, by any person who performed such services on a full-time basis under the direction of a religious organization in connection with the religious tenets of the organization. Such person shall have relied solely on the religious organization for his or her financial support for a minimum of five years. A payment shall not be made if such person or religious organization waives the payment or receipt of compensation for such services in writing. Payment may be made to such religious organization to reimburse it for maintenance of any person who rendered such services and to assist it in providing

future support and maintenance; however, payment shall not be made from any funds or assets acquired with funds donated by or traceable to gifts made to the corporation by any person, organization, or governmental agency other than the members, immediate families of members, and affiliated religious organizations of the religious organization under whose direction the services were performed.

(n) (1) In anticipation of or during an emergency, take either or both of the following actions necessary to conduct the corporation's ordinary business operations and affairs, unless emergency bylaws provide otherwise pursuant to subdivision (g) of Section 5151:

(A) Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent resulting from the emergency.

(B) Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(2) During an emergency, take either or both of the following actions necessary to conduct the corporation's ordinary business operations and affairs, unless emergency bylaws provide otherwise pursuant to subdivision (g) of Section 5151:

(A) Give notice to a director or directors in any practicable manner under the circumstances, including, but not limited to, by publication and radio, when notice of a meeting of the board cannot be given to that director or directors in the manner prescribed by the bylaws or Section 5211.

(B) Deem that one or more officers of the corporation present at a board meeting is a director, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum for that meeting.

(3) In anticipation of or during an emergency, the board may not take any action that requires the vote of the members or is not in the corporation's ordinary course of business, unless the required vote of the members was obtained prior to the emergency.

(4) Any actions taken in good faith in anticipation of or during an emergency under this subdivision bind the corporation and may not be used to impose liability on a corporate director, officer, employee, or agent.

(5) For purposes of this subdivision, "emergency" means any of the following events or circumstances as a result of which, and only so long as, a quorum of the corporation's board of directors cannot be readily convened for action:

(A) A natural catastrophe, including, but not limited to, a hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought, or, regardless of cause, any fire, flood, or explosion.

(B) An attack on this state or nation by an enemy of the United States of America, or upon receipt by this state of a warning from the federal government indicating that an enemy attack is probable or imminent.

(C) An act of terrorism or other manmade disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the infrastructure, environment, economy, government functions, or population, including, but not limited to, mass evacuations.

(D) A state of emergency proclaimed by a governor or by the President.

5141. Subject to Section 5142:

(a) No limitation upon the activities, purposes, or powers of the

corporation or upon the powers of the members, officers, or directors, or the manner of exercise of such powers, contained in or implied by the articles or by Chapters 15 (commencing with Section 6510), 16 (commencing with Section 6610), and 17 (commencing with Section 6710) shall be asserted as between the corporation or member, officer or director and any third person, except in a proceeding: (1) by a member or the state to enjoin the doing or continuation of unauthorized activities by the corporation or its officers, or both, in cases where third parties have not acquired rights thereby, (2) to dissolve the corporation, or (3) by the corporation or by a member suing in a representative suit against the officers or directors of the corporation for violation of their authority.

(b) Any contract or conveyance made in the name of a corporation which is authorized or ratified by the board or is done within the scope of authority, actual or apparent, conferred by the board or within the agency power of the officer executing it, except as the board's authority is limited by law other than this part, binds the corporation, and the corporation acquires rights thereunder whether the contract is executed or wholly or in part executory.

5142. (a) Notwithstanding Section 5141, any of the following may bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust:

(1) The corporation, or a member in the name of the corporation pursuant to Section 5710.

(2) An officer of the corporation.

(3) A director of the corporation.

(4) A person with a reversionary, contractual, or property interest in the assets subject to such charitable trust.

(5) The Attorney General, or any person granted relator status by the Attorney General.

The Attorney General shall be given notice of any action brought by the persons specified in paragraphs (1) through (4), and may intervene.

(b) In an action under this section, the court may not rescind or enjoin the performance of a contract unless:

(1) All of the parties to the contract are parties to the action;

(2) No party to the contract has, in good faith, and without actual notice of the trust restriction, parted with value under the contract or in reliance upon it; and

(3) It is equitable to do so.

CORPORATIONS CODE

SECTION 5210-5215

5210. Each corporation shall have a board of directors. Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033), the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.

5211. (a) Unless otherwise provided in the articles or in the bylaws, all of the following apply:

(1) Meetings of the board may be called by the chair of the board or the president or any vice president or the secretary or any two directors.

(2) Regular meetings of the board may be held without notice if the time and place of the meetings are fixed by the bylaws or the board. Special meetings of the board shall be held upon four days' notice by first-class mail or 48 hours' notice delivered personally or by telephone, including a voice messaging system or by electronic transmission by the corporation (Section 20). The articles or bylaws may not dispense with notice of a special meeting. A notice, or waiver of notice, need not specify the purpose of any regular or special meeting of the board.

(3) Notice of a meeting need not be given to a director who provides a waiver of notice or consent to holding the meeting or an approval of the minutes thereof in writing, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to that director. These waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

(4) A majority of the directors present, whether or not a quorum is present, may adjourn any meeting to another time and place. If the meeting is adjourned for more than 24 hours, notice of an adjournment to another time or place shall be given prior to the time of the adjourned meeting to the directors who were not present at the time of the adjournment.

(5) Meetings of the board may be held at a place within or without the state that has been designated in the notice of the meeting or, if not stated in the notice or there is no notice, designated in the bylaws or by resolution of the board.

(6) Directors may participate in a meeting through use of conference telephone, electronic video screen communication or electronic transmission by and to the corporation (Sections 20 and 21). Participation in a meeting through use of conference telephone or electronic video screen communication pursuant to this subdivision constitutes presence in person at that meeting as long as all

directors participating in the meeting are able to hear one another. Participation in a meeting through use of electronic transmission by and to the corporation, other than conference telephone and electronic video screen communication, pursuant to this subdivision constitutes presence in person at that meeting if both of the following apply:

(A) Each director participating in the meeting can communicate with all of the other directors concurrently.

(B) Each director is provided the means of participating in all matters before the board, including, without limitation, the capacity to propose, or to interpose an objection to, a specific action to be taken by the corporation.

(7) A majority of the number of directors authorized in or pursuant to the articles or bylaws constitutes a quorum of the board for the transaction of business. The articles or bylaws may require the presence of one or more specified directors in order to constitute a quorum of the board to transact business, as long as the death or nonexistence of a specified director or the death or nonexistence of the person or persons otherwise authorized to appoint or designate that director does not prevent the corporation from transacting business in the normal course of events. The articles or bylaws may not provide that a quorum shall be less than one-fifth the number of directors authorized in or pursuant to the articles or bylaws, or less than two, whichever is larger, unless the number of directors authorized in or pursuant to the articles or bylaws is one, in which case one director constitutes a quorum.

(8) Subject to the provisions of Sections 5212, 5233, 5234, 5235, and subdivision (e) of Section 5238, an act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the board. The articles or bylaws may not provide that a lesser vote than a majority of the directors present at a meeting is the act of the board. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for that meeting, or a greater number required by this division, the articles or the bylaws.

(b) An action required or permitted to be taken by the board may be taken without a meeting if all directors individually or collectively consent in writing to that action and if, subject to subdivision (a) of Section 5224, the number of directors then in office constitutes a quorum. The written consent or consents shall be filed with the minutes of the proceedings of the board. The action by written consent shall have the same force and effect as a unanimous vote of the directors. For purposes of this subdivision only, "all directors" does not include an "interested director" as defined in subdivision (a) of Section 5233 or a "common director" as described in subdivision (b) of Section 5234 who abstains in writing from providing consent, where (1) the facts described in paragraph (2) or (3) of subdivision (d) of Section 5233 are established or the provisions of paragraph (1) or (2) of subdivision (a) of Section 5234 are satisfied, as appropriate, at or prior to execution of the written consent or consents; (2) the establishment of those facts or satisfaction of those provisions, as applicable, is included in the written consent or consents executed by the noninterested or noncommon directors or in other records of the corporation; and (3) the noninterested or noncommon directors, as applicable, approve the action by a vote that is sufficient without counting the votes of the interested directors or common directors.

(c) Each director shall have one vote on each matter presented to the board of directors for action. No director may vote by proxy.

(d) The provisions of this section apply also to incorporators, to committees of the board, and to action by those incorporators or committees mutatis mutandis.

5212. (a) The board may, by resolution adopted by a majority of the number of directors then in office, provided that a quorum is present, create one or more committees, each consisting of two or more directors, to serve at the pleasure of the board. Appointments to such committees shall be by a majority vote of the directors then in office, unless the articles or bylaws require a majority vote of the number of directors authorized in or pursuant to the articles or bylaws. The bylaws may authorize one or more such committees, each consisting of two or more directors, and may provide that a specified officer or officers who are also directors of the corporation shall be a member or members of such committee or committees. The board may appoint one or more directors as alternate members of such committee, who may replace any absent member at any meeting of the committee. Such committee, to the extent provided in the resolution of the board or in the bylaws, shall have all the authority of the board, except with respect to:

(1) The approval of any action for which this part also requires approval of the members (Section 5034) or approval of a majority of all members (Section 5033), regardless of whether the corporation has members.

(2) The filling of vacancies on the board or in any committee which has the authority of the board.

(3) The fixing of compensation of the directors for serving on the board or on any committee.

(4) The amendment or repeal of bylaws or the adoption of new bylaws.

(5) The amendment or repeal of any resolution of the board which by its express terms is not so amendable or repealable.

(6) The appointment of committees of the board or the members thereof.

(7) The expenditure of corporate funds to support a nominee for director after there are more people nominated for director than can be elected.

(8) The approval of any self-dealing transaction except as provided in paragraph (3) of subdivision (d) of Section 5233.

(b) A committee exercising the authority of the board shall not include as members persons who are not directors. However, the board may create other committees that do not exercise the authority of the board and these other committees may include persons regardless of whether they are directors.

(c) Unless the bylaws otherwise provide, the board may delegate to any committee powers as authorized by Section 5210, but may not delegate the powers set forth in paragraphs (1) to (8), inclusive, of subdivision (a).

(d) If required by subdivision (e) of Section 12586 of the Government Code, the board shall appoint an audit committee in accordance with that subdivision and for the purposes set forth therein.

5213. (a) A corporation shall have a chair of the board, who may be given the title chair of the board, chairperson of the board, chairman of the board, or chairwoman of the board, or a president or both, a secretary, a treasurer or a chief financial officer or both, and any other officers with any titles and duties as shall be stated in the bylaws or determined by the board and as may be necessary to

enable it to sign instruments. The president, or if there is no president the chair of the board, is the general manager and chief executive officer of the corporation, unless otherwise provided in the articles or bylaws. Unless otherwise specified in the articles or the bylaws, if there is no chief financial officer, the treasurer is the chief financial officer of the corporation. Any number of offices may be held by the same person unless the articles or bylaws provide otherwise, except that no person serving as the secretary, the treasurer, or the chief financial officer may serve concurrently as the president or chair of the board. Any compensation of the president or chief executive officer and the chief financial officer or treasurer shall be determined in accordance with subdivision (g) of Section 12586 of the Government Code, if applicable.

(b) Except as otherwise provided by the articles or bylaws, officers shall be chosen by the board and serve at the pleasure of the board, subject to the rights, if any, of an officer under any contract of employment. Any officer may resign at any time upon written notice to the corporation without prejudice to the rights, if any, of the corporation under any contract to which the officer is a party.

(c) If the articles or bylaws provide for the election of any officers by the members, the term of office of the elected officer shall be one year unless the articles or bylaws provide for a different term which shall not exceed three years.

5214. Subject to the provisions of subdivision (a) of Section 5141 and Section 5142, any note, mortgage, evidence of indebtedness, contract, conveyance or other instrument in writing, and any assignment or endorsement thereof, executed or entered into between any corporation and any other person, when signed by any one of the chairman of the board, the president or any vice president and by any one of the secretary, any assistant secretary, the chief financial officer or any assistant treasurer of such corporation, is not invalidated as to the corporation by any lack of authority of the signing officers in the absence of actual knowledge on the part of the other person that the signing officers had no authority to execute the same.

5215. The original or a copy in writing or in any other form capable of being converted into clearly legible tangible form of the bylaws or of the minutes of any incorporators', members', directors', committee or other meeting or of any resolution adopted by the board or a committee thereof, or members, certified to be a true copy by a person purporting to be the secretary or an assistant secretary of the corporation, is prima facie evidence of the adoption of such bylaws or resolution or of the due holding of such meeting and of the matters stated therein.